[redacted]

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

[redacted] 1925

No. [redacted] 89

MARIANNA MATTHEWS, PLAINTIFF IN ERROR,

vs.

LOUIS J. HUWE, AS TREASURER OF HAMILTON COUNTY, OHIO

IN ERROR TO THE COURT OF APPEALS FOR THE FIRST JUDICIAL DISTRICT OF THE STATE OF OHIO

[redacted]

(26,144)

(30,144)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 297

MARIANNA MATTHEWS, PLAINTIFF IN ERROR,

vs.

LOUIS J. HUWE, AS TREASURER OF HAMILTON COUNTY, OHIO

IN ERROR TO THE COURT OF APPEALS FOR THE FIRST JUDICIAL DISTRICT OF THE STATE OF OHIO

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 15, 1924

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[fol. 1] **IN COURT OF APPEALS OF THE FIRST JUDICIAL DISTRICT OF OHIO, HAMILTON COUNTY, OHIO**

RETURN TO WRIT OF ERROR

In obedience to the commands of the within writ I, herewith, transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals of the First Judicial District of Ohio, Hamilton County, Ohio, in the city of Cincinnati, this fourteenth day of February, A. D., 1924.

Geo. W. Tibbles, Clerk of the Court of Appeals of the First Judicial District of Ohio, Hamilton County, Ohio, by Albert Swing, Deputy Clerk. (Seal of the Court of Appeals, First Appellate District, Ohio.)

[fol. 2] [File endorsement omitted]

IN COURT OF APPEALS OF THE FIRST JUDICIAL DISTRICT OF OHIO, HAMILTON COUNTY, OHIO

No. 2011

MARIANNA MATTHEWS, Plaintiff,

vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio, Defendant

PETITION FOR AND ORDER ALLOWING WRIT OF ERROR—Filed Jan. 24, 1924

Now comes Marianna Matthews, plaintiff, and alleges that she brought this suit in the Court of Common Pleas, to enjoin said defendant from collecting certain assessments, upon the same, alleged constitutional grounds, as hereinafter set forth, and others, and that, upon the trial de novo of this cause, upon appeal in this court, final judgment was rendered in favor of the plaintiff enjoining only such interest upon the deferred payments of said assessments as was in excess of six (6%) per cent, but holding as against the plaintiff that the County Commissioners of Hamilton County, Ohio, were authorized to levy said assessments upon the property in question; that their proceedings were had in conformity to law; and that the assessments, except said excess interest, were valid; and that the plaintiff was not entitled to the further injunction for which she prayed.

The Plaintiff further alleges that said judgment was rendered on the 25th day of April 1923; and that on the 24th day of May 1923, she brought, as of right, in the Supreme Court of Ohio, pro-
[fol. 3] ceedings in error thereto, upon the same alleged constitutional grounds, as hereinafter set forth, and others; and that on the fourth day of December, 1923, her said proceedings in error were dismissed by the Supreme Court of Ohio upon the sole ground, that the said alleged grounds were not debatable Constitutional questions, and that consequently it did not have jurisdiction to hear said cause. The said judgment of this Court, being therefore that of the highest Court of law or equity in the state of Ohio, having jurisdiction thereof, has held and adjudged, that the levy of said assessments by said County Commissioners, by their resolution and proceedings, upon the plaintiff's real estate, under that part of the Act of the General Assembly of the state of Ohio, 106 Ohio Laws 574 (637), Sec. 207, and amended 107 Ohio Laws 69 (129), which is now section 1214 of the General Code of the state of Ohio, is not, and that said section itself, as so construed by said holding and judgment of this Court, is not, in violation of, and repugnant to, the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

In said ruling and judgment said Court of Appeals erred to the prejudice of the plaintiff, all of which appears in the record, opinion and final judgment of said Court of Appeals, described as aforesaid, and remanding this cause to said Court of Common Pleas to carry the same into execution.

[fol. 4] Wherefore your petitioner prays for an allowance of a Writ of Error from the Supreme Court of the United States to the Court of Appeals of the First Judicial District of Ohio, Hamilton County, Ohio, and the judges thereof, to the end that the record in this case may be removed into the Supreme Court of the United States, and the errors complained of by your petitioner may be examined and corrected, and said judgment modified, and said cause remanded for further proceedings; and your petitioner will ever pray.

Mortimer Matthews, Attorney for Plaintiff.

The Writ of Error as prayed for in the foregoing petition is hereby allowed this 24th day of January, 1924, the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of Two Hundred ($200.00) Dollars.

Dated at the City of Cincinnati, Ohio, this 24th day of January, 1924.

Wade Cushing, Presiding Judge of the Court of Appeals of the First Judicial District of the State of Ohio.

[fol. 5] [File endorsement omitted]

IN COURT OF APPEALS

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Jan. 24, 1924

Now comes the plaintiff, in connection with the petition for a writ of error herein, and respectfully submits that in the record, proceedings, decision and final judgment, of the Court of Appeals of the First Judicial District of the State of Ohio Hamilton County Ohio in the above entitled action there is manifest error in this to-wit:

The Court of Appeals of the First Judicial District of the State of Ohio, Hamilton County, Ohio, erred, in that it rendered judgment for the plaintiff, enjoining certain excess interest only, upon deferred payments of the assessments complained of, and in that it refused to render judgment for the plaintiff, enjoining the entire amount of said assessments, as being repugnant to, and in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States, which declares that no state shall deprive any person of prop-
[fol. 6] erty without due process of laws.

Said error consisted in so construing that part of the Act of the General Assembly of the State of Ohio, 106 Ohio Laws 574 (637), Sec. 207, and amended 107 Ohio Laws 69 (129), now section 1214 of the General Code of the state of Ohio, which required the County Commissioners of Hamilton County to levy the assessments complained of, upon an apportionment, according to the benefits accruing to the lands assessed within one-half mile of either side of the improvement, as to hold, that the said County Commissioners were authorized to levy said assessments, that their proceedings were had in conformity to law, and that said assessments were valid, notwithstanding the fact, that said County Commissioners, ostensibly proceeding to make or direct an apportionment according to benefits, nevertheless actually directed the plainly arbitrary division of the amount to be assessed into three equal parts, one of which they assessed against all the property abutting upon the improvement in proportion to the number of front feet contained in each part, parcel, tract and lot abutting thereon, another, upon all the property within one-half mile of both sides thereof in proportion to its acreage or area, and the third upon all the said property in proportion to the tax valuation of each part, parcel, tract, and lot involved, (including the tax valuation of buildings thereon) as the same appears on the tax duplicate of Hamilton County.

Said repugnancy and conflict consist in the following particulars:

First. The plaintiff's lands, which were assessed, lie and abut upon a county road approximately parallel with the improvement, throughout the entire length of both, and lie, in a direct line, within one-half mile of, but do not abut upon the improvement, nor upon

any connecting road, within one-half mile by such road, whereas other assessed lands, not abutting upon the improvement, nor upon [fol. 7] said parallel county road, abut upon other connecting roads at a very much shorter distance from said improvement, or have access thereto, over other abutting lands of the same owner, at very much shorter distances. As the apportionment above described omitted to take into account either the factor of direct distance, or that of distance of access, which are those, without which no valuation of relative benefits could have been made, as between the plaintiff's lands and said other assessed lands not abutting upon the improvement, but lying much nearer and having much nearer access thereto, said assessments and their justification under said section 1214, result in the deprivation of the plaintiff of her property without due process of law.

Second. Some of the plaintiff's property, more distant, as it is, than other non-abutting and also abutting property, was of higher tax valuation, and had upon it buildings of much greater tax valuation than some of either of the latter. It was upon a wrong and plainly arbitrary principle, and a deprivation of the plaintiff of her property without due process of law, to include, as a factor in the valuation of relative benefits, in a definite inflexible ratio, either the value of bare land, or buildings, without reference to distance, whether direct, or by means of access, or the value of buildings, at all, as a part of the value of lands.

[fol. 8] Third. All of the plaintiff's property abutting, as it did and does, upon a County Road approximately parallel to the improvement throughout the entire length of both, had and has no need of the improvement as a means of access. As the value of the plaintiff's land depends wholly upon its own direct means of access thereto, it owes none of its value to the road for the improvement of which it has been assessed, and has received therefrom, no particular or special benefit, to any extent whatsoever, within the meaning of such, as under Section 1 of the Fourteenth Amendment to the Constitution of the United States, local assessments may be levied; between which and common or general benefits, there is a wide distinction, the same for the assessment of special benefits as for damages. The assessment of plaintiff's lands, in any sum whatsoever, and the justification thereof under said section 1214, results in the deprivation of the plaintiff of her property without due process of law, within the meaning of the terms of said Constitutional provision.

Mortimer Matthews, Attorney for Plaintiff.

[fol.9] [File endorsement omitted]

IN COURT OF APPEALS

[Title omitted]

WRIT OF ERROR—Filed Jan. 24, 1924

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges of the Court of Appeals of the First Judicial District of the State of Ohio, Hamilton County, Ohio:

Because in the record and proceedings, as also in the rendition of the Judgment, of a plea which is in the said Court of Appeals of the First Judicial District of the State of Ohio, Hamilton County, Ohio, before you or some of you, being the highest Court of law or Equity of said state in which decision could be had in the said suit between Marianna Matthews and Louis J. Huwe, as Treasurer of Hamilton County, Ohio, wherein was drawn in question the validity of a statute of said state on the ground of its being repugnant to the provisions of the Constitution of The United States and the Amendments thereto and said decision was in favor of such, its validity, a manifest error hath happened, to the great damage of said Marianna Matthews as by her complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in their behalf, [fol. 10] do command you, if judgment be therein given, that then under your seal, distinctly and openly, you sent the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same at Washington on the 23rd day of Feb., 1924, in the said Supreme Court of the United States, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of The United States may cause further to be done therein, to correct that error, what of right and according to the laws and customs of The United States should be done.

Witness the Honorable Wm. Howard Taft, Chief Justice of the Supreme Court of the United States, the 24th day of January, in the year of our Lord 1924.

B. E. Dilley, Clerk of the United States District Court in the Southern District of Ohio, Western Division, by Harry F. Rab, Deputy. (Seal of the United States District Court, Southern Dis, of Ohio.)

Allowed by Wade Cushing, Presiding Judge of the Court of Appeals of the First Judicial District of the State of Ohio, Hamilton County, Ohio.

[fol. 11] CITATION—In usual form, showing service on Chas. S. Bell et al.; filed Jan. 28, 1924; omitted in printing

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[fol. 12] [File endorsement omitted]

IN COURT OF APPEALS

[Title omitted]

STIPULATION re TRANSCRIPT OF RECORD—Filed Jan. 28, 1924

Cincinnati, Ohio, January 28th, 1924.

The undersigned Counsel for the respective parties in this cause hereby stipulate that the Clerk of the Court, shall make a transcript of, shall certify and transmit the entire Record in this cause, together with all pleadings and papers filed in this Court, except such as were filed prior to the amended and supplemental petition, and except the testimony of the following witnesses contained in the Bill of Exceptions, to-wit: the cross-examination of J. A. Stewart, the testimony of H. D. Hooge, the cross-examination of Marianna Matthews, the testimony of H. Earl Johnston, and the testimony of W. E. Maddux, and except Plaintiff's Exhibit 7, and all that part of Plaintiff's Exhibit 11 beginning "Commissioners' Letter File," on page 200 to the end of said Exhibit 11, page 210 of the printed record.

Mortimer Matthews, Atty. for Plaintiff. Chas. S. Bell, Pros. Atty, Hamilton County, Ohio, Chester S. Dunn, Asst. Pros. Atty., Hamilton County, Ohio, Attorneys for Defendant.

[fol. 13] [File endorsement omitted]

IN COURT OF APPEALS

[Title omitted]

ADDITIONAL STIPULATION RE TRANSCRIPT OF RECORD—Filed Feb. 9, 1924

Cincinnati, Ohio, February 2, 1924.

The undersigned counsel for the respective parties in this cause, hereby, additionally stipulate that the Clerk of the Court in making, certifying, and transmitting a transcript of record herein, shall use as the basis of a part of said record the printed copy of the record printed for the Supreme Court of Ohio in the cause wherein Mortimer Matthews was plaintiff and this defendant was defendant, numbered 2010 upon the docket of this court, beginning at the middle of page

five thereof, making such erasures, alterations, and interlineations on pages 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 17, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, and 35, as may be necessary to make the same a true and correct copy of the record of this cause.

Mortimer Matthews, Atty. for Plaintiff.

O. K. C. S. Durr, Asst. Pros. Atty., Atty. for Defendant.

[fol. 14] STATE OF OHIO,
Hamilton County:

IN COURT OF APPEALS, FIRST APPELLATE DISTRICT

No. 2010

MORTIMER MATTHEWS, Plaintiff,

vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio, Defendant

No. 2011

MARIANNA MATTHEWS, Plaintiff,

vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio, Defendant

Mr. Mortimer Matthews, Counsel for Plaintiffs.
Mr. Charles S. Bell, Prosecuting Attorney, and Mr. Chester S. Durr, Assistant Prosecuting Attorney, Counsel for Defendant.

OPINION

April 16th, 1923.

BUCHWALTER, J.:

The two actions were heard on appeal.

Plaintiff in each cause is the owner of real estate, sought to be assessed for a portion of the expenses of improving a highway known as Section X the Glendale and Milford Road, also known as Intercounty Highway No. 46.

[fol. 15] An order is asked enjoining the defendant from collecting the assessment which was levied on the real estate situated within one-hal*d* mile of said improvement.

Numerous questions are raised.

First. That the County Commissioners are entitled to charge only six per cent interest on deferred payments, under Section 1216 General Code; where, in the present instance interest was charged in the same amount as was required for the payment of the interest on

bonds issued, payable in ten years, which when computed made the interest on the deferred payments of the assessment about ten per cent.

That portion of Section 1216 General Code, which provides for payment, when bonds are issued, is as follows:

"In the event that bonds are issued to pay the costs and expenses of such improvement the principal sum of such assessments shall be payable in such number of equal semi-annual installments as will provide a fund for the redemption of the bonds so issued and such assessments shall bear interest from the date of and at the same rate as the bonds, and the interest shall be collected in like manner as the principal of such assessments."

The plain purport of this Section is that, if bonds are issued, bearing six per cent interest coupons, said deferred payments shall bear interest at six per cent from the date of said bonds. This contemplates the issuance of serial bonds, which become due from time to time as installments are paid by the property owners. To charge interest on assessment payments already made, is not contemplated by this Act.

The resolution of the Board of County Commissioners of July 9th, 1920, does not, nor does the notice of the Clerk of the Board to the [fol. 16] County Auditor of the same date, contemplate interest on any assessments, except those which are unpaid.

The case of Wilcox vs. Village of Edgarton, 103 O. S. 267 relied on by defendant, does not authorize a higher rate of interest on deferred installments than the rate of interest on the bonds.

The interest on installment payments of assessments in excess of six per cent will therefore be enjoined.

Second. That the County Commissioners are without jurisdiction to apply for State aid, unless a petition has first been filed by twenty-five per cent of the abutting property owners.

Section 1204 General Code provides:

"* * * The county commissioners may, without the presentation of any petition, make application to the State Highway Commissioner for aid in the construction of inter-county highways or main market roads under the provisions of this chapter and nothing herein shall in any way restrict their right to make such application."

It is contended by the plaintiffs that the County Commissioners have authority to act without a petition only when a new intercounty highway is to be built.

Section 1189 General Code provides how such intercounty highways are established, to-wit: they are designated by the State Highway Commissioner. However, if the application as made was improper, that might warrant the State Highway Commissioner in refusing to extend State aid, but would not make the proceedings

and assessment void. The county commissioners may improve inter- [fol. 17] county highways under Section 1203, or the State may make such improvements under Section 1202, or it may be done jointly. The county commissioners are also given authority to extend the assessment over areas not actually abutting on the road in question. The action of the Commissioners in applying for State aid in the improvement of the road in question was authorized under the law.

Third. That the county commissioners made application for State aid for the improvement of all that part of Intercount- Highway Number 46 situated in the County of Hamilton, nine and one-half miles in length, and filed therewith their certified resolution that the public interest demanded said improvement. This was approved by the Highway Commissioner.

It is maintained that under this application and resolution the county commissioners did not have jurisdiction to improve Section X, but the improvement should have been for the entire roadway covered by the resolution, and that, therefore, the commissioners, acting without jurisdiction in constructing Section X, the assessments are void.

The commissioners, by resolution, and in the published notice, advised the owners of real estate within the assessment zone that Section X, which was therein described, was to be improved, and a hearing was had as to this section of the improvement. Later, notice was again published, according to law, advising that a hearing was to be had on the proposed assessments for said Section X. Objections could have been presented at these hearings. The record does not disclose that Section X is the only portion of said highway which is to be improved. The fact that the State Highway Department approved the entire improvement and authorized its completion, does not bind the commissioners to proceed with the entire improvement under one contract. It does authorize that the entire [fol. 18] work be done, and that funds will be available from State monies, as the improvement is made.

Fourth. That it is necessary to the validity of an assessment on real estate other than general taxes that notice be given to the owner, and an opportunity afforded to be heard in opposition or defense. It it is admitted that he is not entitled to personal service, but that such notice be given as will fairly apprise him of the pendency of the assessment proceedings, so as to give him an opportunity for a hearing upon the merits.

The notice by publication referred to Section X of the Glendale and Milford Road, also known as Intercounty Highway No. 46, and designated the area subject to the assessment. Said notice did not give the names of the property owners or any description of the individual tracts of land. However, publication was made according to the provisions contained in Section 1214 General Code, and we consider it was sufficiently definite to apprise the plaintiffs of the

action which was being taken for the improvement of said roadway, and the time when hearing was to be had upon the assessments.

Fifth. That inasmuch as plaintiff's property does not abut upon the improvement, but has access upon a parallel County Road, and is not dependent upon Intercounty Highway No. 46, Section X, no special benefits were conferred.

The plaintiff's real estate which was assessed was within the area included within one-half mile of the Intercounty Highway. The evidence as set forth in the record does not establish that the assessment was unfair. On receiving the report of the County Surveyor, apportioning the amounts on the property specially assessed, the Commissioners, after hearing, confirmed the assessments, and found the property in question to have been specially benefited in the amount as levied against the same.

[fol. 19] No written objection was filed with the commissioners, as provided for in Section 1214 General Code:

"If any owner of property affected thereby desires to make objections he may file his objection to said assessment, in writing, with the county commissioners, or township trustees, as the case may be, before the time for said hearing."

The Section further provides that the Commissioners may act as an equalizing board, may change assessments, and then shall approve and confirm the assessments, as reported by the surveyor, or modified by them. When so approved and confirmed, they should be a lien on the land chargeable therewith.

Sixth. That the apportionment and assessment were not made according to benefits, but were arbitrarily made, one-third on the property fronting on said highway, one-third on the area, and one-third on the value of the different tracts.

The commissioners had recommended that the apportionment should be made in the above manner. However, it was for the surveyor to make an apportionment, according to benefits, and the method suggested by the commissioners in no way bound him. He made such a report, and the Board of County Commissioners, after a hearing, of which notice was duly given, approved and confirmed that report, and made a finding that the assessments were made according to special benefits accruing to the land. Objections could have been made as heretofore stated, if the apportionment was unfair or inequitable.

Seventh. That the county commissioners, by resolution, waived contribution from the townships, in which Section X is situated, of any part of the cost of improving said Section, but did not assess upon [fol. 20] the property owners any amount in excess of ten per cent of the total cost, and it is claimed that the real estate within the one-half mile area on both sides of Section X of said highway could not be assessed under Section 1214 General Code, but that only the property actually abutting on the improvement could be charged. That

to charge the other property, an amount must be assessed greater than ten per cent of the cost of the improvement.

Section 1214 General Code states:

"* * * and provided further, that the county commissioners, by resolution, passed by unanimous vote, may make the assessment of ten per cent or more, as the case may be, of the cost and expenses of the improvement against the real estate within one-half mile of either side of the improvement, or against the real estate within one mile of either side of the improvement."

Section 1214-1, also give authority to the Board of County Commissioners to assess all or any part of the compensation, damages, costs and expenses of constructing a road improvement against the real estate abutting upon said improvement, or the real estate situated within one-half mile on either side thereof. Therefore, the fact that only ten per cent of the cost was assessed, did not make the assessment upon lands within the one-half mile area illegal or void.

Eighth. It is further contended that the Intercounty highway in question is not a local improvement, and appears to be for general public benefit, and that the General Assembly was without power to provide for local assessments upon property owners for this improvement.

[fol. 21] The right of the Legislature to authorize an assessment for special benefits to property, growing out of a public improvement was fully discussed, and the power to so do established in the case of Miami County v. Dayton, 92 O. S. 215, at 235:

"Innumerable instances are available in our jurisprudence with reference to public improvements, such as turnpike roads, ditches and the like, where the legislature has delegated to township trustees, county commissioners or other bodies, authority to lay out and organize districts for the construction of such improvement and for taxing or assessing the lands benefited thereby, and such enactments have been almost uniformly held valid; that is, that they were not a delegation of legislative power as prohibited by the constitution."

We find that under the law the county commissioners were authorized to levy assessments on the property in question; that their proceedings were had in conformity to law; and that the assessments are valid. Having failed to pay in cash, the assessments covering a period of ten years are a lien on the real estate.

A restraining order will be granted, to prevent the collection of interest charges in excess of six per cent on said deferred payments. As to all other matters, a restraining order will be denied.

Cushing and Hamilton, Judges, concur.

[fol. 22] IN COURT OF APPEALS

[Title omitted]

DOCKET AND JOURNAL ENTRIES FROM MAY 8TH, 1923, TO FEBRUARY 7TH, 1924, INCLUSIVE

1923, June 18.—Certified copy of entry from Supreme Court filed.

June 21, (Jan. Term).—Minute 174 Certified copy of entry from Supreme Court granting motion for stay of execution.

Upon motion of plaintiff in error herein it is ordered that execution of the judgment of the Court of Appeals of Hamilton County, Ohio, in Cause No. 2011 on the docket of said court, wherein Marianna Matthews is plaintiff, and Louis J. Huwe, as Treasurer of Hamilton County, Ohio, is defendant, and the collection of the assessments therein litigated, be stayed, until the final hearing of the case in this Court upon the plaintiff in error, Marianna Matthews, giving bond to the defendant in error, said bond to be executed, on the part of the plaintiff in error with sufficient surety in the sum of $200.00 to the satisfaction and approval of the Clerk of Courts of Hamilton County, Ohio, conditioned that plaintiff in error will prosecute her petition in error to effect, and will abide and perform the judgment of this Court and pay all damages, penalties and costs that may be awarded against her in this case.

I, Seba H. Miller, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the records of said Court, to-wit: from Journal No. 29, Page —.

In witness whereof, I have hereunto subscribed my name and [fol. 23] affixed the seal of said Supreme Court this 19th day of June, A. D. 1923.

Seba H. Miller, Clerk, by L. J. Corcoran, Deputy. (Seal.)

1923, Dec. 27 (Nov. Term).—Minute 52 Certified copy from Supreme Court dismissing petition in error at the costs of plaintiff in error.

This cause came on to be heard upon the transcript of the record of the Court of Appeals of Hamilton County, and it appearing to the Court that this cause was filed as of right and that the record presents no debatable constitutional question, it is ordered that the petition in error be, and the same hereby is dismissed.

It is further ordered that defendant in error recover from the plaintiff in error his costs herein expended, taxed at $—.

I, Seba H. Miller, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the records of said Court, to-wit: from Journal No. 29 Page 587.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 11th day of December, A. D. 1923.

Seba H. Miller, Clerk, by L. J. Corcoran, Deputy. (Seal.)

1924, Jan. 24.—Petition for writ of errors from the Supreme Court of the United States to the Court of Appeals of the First Judicial District of Ohio, Hamilton County, Ohio, filed.

Jan. 24.—Assignment of errors on writ of error from the Supreme Court of the United States to the Court of Appeals of the First Judicial District of the State of Ohio, Hamilton County, Ohio, filed.

Jan. 24.—Writ of error from the Supreme Court of the United States to the Court of Appeals of the First Judicial District of the State of Ohio, Hamilton County, Ohio, filed.

[fol. 24] 1924, Jan. 24 (Jan. Term).—Minute 27, Entry allowing writ of error.

The above entitled cause coming on to be heard upon the petition of the Plaintiff therein for a writ of error from the Supreme Court of the United States to the Court of Appeals of the First Judicial District of the State of Ohio, Hamilton County, Ohio, and upon the examination of said petition and the record in said case, and desiring to give the petitioner an opportunity to present to the Supreme Court of the United States the questions presented by the record in said case.

It is ordered that a Writ of Error be and the same is hereby allowed to this Court from the Supreme Court of The United States and that the bond presented by said petitioner be and the same is hereby approved.

Wade Cushing, Presiding Judge.

Cincinnati, Ohio, January 24th, 1924.

Jan. 25.—Bond 112 in General Bond Book 12 in $200.00 given.

Jan. 25.—Two copies of Writ of Error filed.

Jan. 28.—Citation filed.

Jan. 28.—Stipulation as to Transcript of record filed.

Feb. 7.—Additional stipulation as to Transcript of record filed.

Feb. 7 (Jan. Term).—Minute 38, Entry substituting Ferd J. Bader, Treasurer.

Now comes the plaintiff in this cause and suggests to the Court that after judgment in this cause in this Court, the term of office of the said Louis J. Huwe, as Treasurer of Hamilton County, Ohio, defendant expired, and his successor, Ferdinand Bader, having been elected, was qualified and inducted into office as Treasurer of Hamilton County, Ohio.

Now, therefore, in consideration of the premises and with the consent of Counsel of Record for both parties hereto, the Court directs and orders that said Ferdinand Bader, as such Treasurer, be substituted as defendant for said Louis J. Huwe, as Treasurer and that the said Judgment stand as against the said Ferdinand Bader, as [fol. 25] Treasurer, as aforesaid, and be in all respects as against him as such Treasurer; and be enforced against said Ferdinand Bader, as Treasurer, as aforesaid, in accordance with the statutes in such case made and provided.

Mortimer Matthews, Attorney for Plaintiff. Chas. S. Bell, Chester S. Durr, Attorneys for Defendant.

[fol. 26] Bond on Writ of Error for $200—Approved and filed Jan. 25, 1924; omitted in printing

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[fol. 27] In Court of Appeals

Certificate of Lodgment

I, George W. Tibbles, Clerk of said Court, do hereby certify that there was lodged with me as said Clerk on January 25, 1924, in the case of Marianna Matthews, plaintiff, against Louis J. Huwe, as Treasurer of Hamilton County, Ohio, defendant—

(1) The original bond a copy of which is herein set forth.

(2) Two copies of the Writ of Error as herein set forth, one for the defendant, and one to file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court in Cincinnati, Hamilton County, Ohio, this fourteenth day of February, A. D., 1924.

Geo. W. Tibbles, Clerk of the Court of Appeals of the First Judicial District of Ohio, Hamilton County, Ohio, by Albert Swing, Deputy Clerk. (Seal of the Court of Appeals, First Appellate District of Ohio.)

[fol. 28] In Court of Appeals

[Title omitted]

Clerk's Certificate

I, George W. Tibbles, Clerk of the Court of Appeals of the First Judicial District of Ohio, Hamilton County, Ohio, do, hereby certify that the foregoing petition for Writ of Error, Assignment of Error, Order Allowing Writ of Error, Writ of Error, Citation to Defendant and His Entry of Appearance, and Stipulation and additional Stipulation as to Transcript of Record are the original papers filed in this Court in the above entitled cause; that the copy of the bond hereto attached is a true copy of the bond filed in said cause; that the (printed) copy of the record attached hereto beginning at the middle of page five thereof is a true copy of the record of said cause, (the parts erased therefrom on pages 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 164, 165, 166, 167, 169, 170, 171, 172, 173, 178, 200, 201, 202, 203, 204, 205 206, 207, 208, 209, and 210 being so erased in accordance with the [fols. 29-37] stipulation as to transcript of record; the erasures, alterations, and interlineations on pages 5, 6, 7, 8, 9, 10, 11, 12, 13, 14,

17, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, and 35, being so made in accordance with the additional stipulation as to transcript of record); that the printed copy of the record attached hereto as so corrected by erasure and interlineation is a true copy of the record in said cause; that plaintiff's Exhibits 1, 9, and 10 attached are true copies of said Exhibits as attached to the Bill of Exceptions in this cause, that the transcript of Docket and Journal Entries as contained and so corrected in said printed record and the foregoing additional transcript of Docket and Journal Entries attached are truly taken and correctly copied from the records of this Court and that the opinion attached hereto was rendered by this Court in said cause.

In witness whereof I have hereunto subscribed my name and affixed the seal of said Court of Appeals of the First Judicial District of Ohio, Hamilton County, Ohio, this 14th day of February, A. D., 1924.

Geo. W. Tibbles, Clerk of the Court of Appeals of the First Judicial District of Ohio, Hamilton County, Ohio, by Albert Swing, Deputy. (Seal of the Court of Appeals, First Appellate District of Ohio.)

Clerk's fee for additional docket & journal entries, $1.75, paid by Mortimer Matthews.

[fol. 38] In Court of Common Pleas, Hamilton County, Ohio

[Title omitted]

Minute Entries

Petition filed January 17, 1921. Action for injunction and other relief.

1921, Jan. 17th (Jan. Term).—Minute 3039. Temporary restraining order allowed. Bond, $200.00. Let temporary restraining order issue as prayed for. Bond in the sum of two hundred dollars ($200.00) to the satisfaction of the clerk.

Jan. 17th.—Bond, 185 in Bond Book 22, in $200.00 given (see safe).

Jan. 17.—Summons issued. Indorsed: Injunction allowed. Bond $200.00 given. Fred E. Wesselman, clerk, by Albert Swing, deputy.

Jan. 17th.—Motion for temporary restraining order filed.

Jan. 24th.—Summons returned indorsed: Received. Ferd Bader, Sheriff Hamilton County, Ohio. Jan. 17th, 3.42 p. m., 1921.

Cincinnati, January 18, 1921.

Served the within named defendant, Louis J. Huwe, as Treasurer of Hamilton County, Ohio, by delivering to him personally a true copy of this writ with all the indorsements thereon.

Ferd Bader, Sheriff Hamilton County, Ohio, by Ray D. Podesta, Deputy.

Sheriff fees, 91 cents.

[fol. 39] Jan. 28th.—Demurrer of defendant filed.

Feb. 7th.—Motion to withdraw demurrer filed.

Feb. 7th (Jan. Term).—Minute 3136. Entry granting leave to withdraw demurrer and granting defendant additional time in which to plead.

This cause now coming on for hearing on the motion of Louis H. Capelle, Prosecuting Attorney of Hamilton County, acting by and for the defendant herein, the court on consideration thereof grants the right to withdraw the demurrer heretofore filed herein and grants said defendant the right to answer herein on or before the 26th day of February, 1921.

1921, Mar. 5th (Jan. Term).—Minute 3234. Leave given defendant to file motion for an extension of time in which to answer.

Mar. 5th.—Motion filed.

Mar. 5th (Jan. Term).—Minute 3234. Entry granting an extension of time in which to answer.

This cause coming on for hearing on the motion of Louis H. Capelle, Prosecuting Attorney of Hamilton County, Ohio, acting by and for the defendant herein, the court on consideration thereof grants an extension of time in which to answer until the 29th day of March, 1921.

Mar. 7th.—Answer of defendant filed.

1922, Jan. 5th (Jan. Term).—Minute 3008. Leave given to file amended and supplemental petition.

Jan. 5th.—Amended and supplemental petition filed.

[fol. 40] Jan. 5th (Jan. Term).—Minute 3008. Entry granting leave to file amended and supplemental petition.

On application of plaintiff leave is given to file her amended and supplemental petition and the same is filed accordingly.

Jan. 5th (Jan. Term).—Minute 3007. Temporary restraining order allowed. Bond $500.00.

Let temporary restraining order issue as prayed for. Bond in the sum of five hundred dollars to the satisfaction of the clerk.

Jan. 5th.—Bond, 276 in Bond Book 22, in $500.00 for injunction given (see safe).

Jan. 5th.—Summons issued to January 16, 1922. Indorsed: Injunction allowed. Bond in $500.00 given. George W. Tibbles, clerk, by Albert Swing, deputy.

Jan. 7th.—Answer to amended petition filed.

Jan. 16th.—Summons returned indorsed: Received. Ferd Bader, Sheriff, Hamilton County, Ohio. Jan. 5th, 3:56 p. m., 1922.

Cincinnati, Jan. 6, 1922.

Served the within named defendant, Louis J. Huwe, as Treasurer of Hamilton County, Ohio, by delivering to him personally, a true copy of this writ with all the indorsements thereon.

Ferd Bader, Sheriff, Hamilton County, Ohio, by John Krieg, Deputy.

Sheriff fees, 91 cents.

[fol. 41] 1922, Feb. 20th (Jan. Term).—Minute 1406. Application for an official stenographer filed and allowed.

Mortimer Matthews, attorney for plaintiff and C. S. Durr, Assistant Prosecutor, attorney for defendant, request the services of an official stenographer to make a full report of the testimony and proceedings in this case.

(Signed) C. S. Durr, for Defendant. Mortimer Matthews, for Plaintiffs.

The above request for an official stenographer is granted and John C. Kiehborth is appointed to make a full report of the testimony and proceedings.

Feb. 20th (Jan. Term).—Minute 1436. Entry ordering the official stenographer to transcribe testimony.

For good cause shown the court of its own motion orders John C. Kiehborth, official stenographer, to make a transcript of the testimony in this case and the costs to be paid by warrant on the county treasurer and taxed and collected as other costs in this case and certificate for $30.24 issued for same.

Mar. 31st (Jan. Term).—Minute 1587. Entry dissolving temporary injunction at the costs of plaintiff. Plaintiff gives notice of appeal. Appeal bond, $200.00.

Judgment

This cause coming on to be heard this day on the pleadings, the [fol. 42] evidence and arguments of counsel, and the court being fully advised finds for the defendant.

Wherefore it is ordered, adjudged and decreed that the temporary restraining order heretofore issued be dissolved, the prayer for an injunction be refused, the action dismissed, and the defendant recover from the plaintiff his costs herein expended.

The plaintiff having given notice of her intention to appeal the court fixes the appeal bond in the sum of $200.00.

1922, Apr. 3d.—Bond, 7 in Bond Book 25, in $200.00 for appeal given (see safe).

Clerk's certificate to foregoing paper omitted in printing.

[fol. 43] IN COMMON PLEAS COURT

AMENDED AND SUPPLEMENTAL PETITION—Filed January 5, 1922

The plaintiff, Marianna Matthews, says that she is, and has been, for many years, a citizen and resident of Hamilton County, in the State of Ohio, and that Louis J. Huwe, as Treasurer of Hamilton

County, in the State of Ohio, defendant herein, was elected, and is now qualified and acting as such, and that the tax duplicate for the year 1921 is now in his hands as treasurer as aforesaid for the collection of taxes and assessments thereupon entered.

Plaintiff is, and was at all times mentioned in this petition, the owner in fee simple of a certain tract of land in Sycamore Township in Hamilton County, in the State of Ohio, and entered upon said duplicate as follows:

(1) A tract of land containing nine (9) acres being part of a 117.84 acres tract of land in the north half of Section 35, Township 4, Range 1. Said tract is thus entered upon said duplicate in plaintiff's name at a total value of ten thousand two hundred and forty ($10,240.00) dollars; and one-half (½) of the taxes assessed and levied thereon on said duplicate for the year ninteen hundred and twenty-one, payable January 15, 1922, is $61.13, of which, however, the defendant will not accept payment unless plaintiff, also, pays three certain instalments of an assessment on part thereof, for the improvement of Section X, of the Glendale and Milford Road, being Intercounty Highway, No. 46, Section X, in the sum of $11.97 each, which, also, appear upon said duplicate as payable at the same time. [fols. 44-46] A part of said land, to-wit, seven and ten hundredths (7.10) acres thereof, is claimed by the County Commissioners of Hamilton County, Ohio, to lie within a half mile of said Section X, by direct line, but does not abut upon the same, and is the part, on which said assessment is levied. None of said land, however, lies within a half mile of said Section X by the nearest connecting public roads.

[fol. 47] The County Commissioners of Hamilton County, Ohio, on April 13, 1920, adopted resolutions to the effect that the public interest demanded the improvement under the provisions of Sections 1178 to 1231-11, inclusive, of the General Code of Ohio of that part of Intercounty Highway No. 46, situated in the County of Hamilton, and described as beginning at the Carthage-Hamilton Road, Intercounty Highway No. 43, thence along the line of the Glendale-Milford Road, Intercounty Highway No. 46, to the Miami River, in Springfield, Sycamore and Symmes townships, in all, a distance of nine and one-tenth miles; and that they did thereby make application to the State Highway Commissioner for aid by the State of Ohio for said improvement and did thereby agree to pay one-half the preliminary expenses thereof, and immediately transmitted the same to the said Highway Commissioner, who on or about April 16, 1920, approved said application exactly as requested. Said approval was received by said County Commissioners and was ordered filed by them April 30, 1920.

Said action by said County Commissioners was upon their own initiative and without a petition therefor of any of the owners of the lineal feet abutting on said Intercounty Highway No. 46, including Section X thereof. The said application was for state aid in the improvement, as distinguished from the construction, of said Inter-

county Highway No. 46, which had, including said Section X, been already constructed, and was for all of the same that is situated in [fol. 48] Hamilton County, nine and one-tenth miles in length, as distinguished from any fractional part, or section thereof, such as Section X, only two and fifty-seven hundredths miles in length, as described in the subsequent proceedings, all of which expressly concern said Section X only, and its improvement as distinguished from its construction. Said County Commissioners did not adopt any resolution that the public interest demanded the improvement of said Section X only.

On May 11, 1920, said County Commissioners adopted resolutions, reciting said initial resolutions, application, agreement and approval, as hereinbefore alleged, and declaring it necessary to improve that part only of the Glendale-Milford Road, also known as Intercounty Highway No. 46, beginning at the point where Intercounty Highway No. 46 intersects Intercounty Highway No. 43, thence east along the route of Intercounty Highway No. 46 to the point where Intercounty Highway No. 46 intersects Intercounty Highway No. 19, being all in Springfield and Sycamore townships, Hamilton County, Ohio, and comprising a distance of only two and fifty-seven hundredths miles, designated and thereafter to be known as Section X of the Glendale-Milford Road, or Intercounty Highway No. 46.

Said resolutions further provided, that the County of Hamilton pay all the expenses and costs of the improvement over and above the amount contributed by the state, and over and above the amount to be raised by assessments to be levied on all property lying within one-half mile on both sides of the proposed improvement in accordance [fol. 49] to the benefits thereto, being that part of the entire cost of the improvement represented by ten per cent (10%) of the most expensive type of improvement contemplated in the plans, profits, specifications, and estimates, excepting therefrom the cost of bridges and culverts.

Said plans, profiles, specifications and estimates, included a change in a part of the line of said proposed improvement of said Section X from that followed by the existing highway, and thereby needlessly increased the total cost of the same about fifteen thousand dollars. By making such change it was not possible to eliminate dangerous curves, sharp angles or steep grades; nor was such change planned and specified with any such purpose in view. In adopting said most expensive type of improvement and in specifying said unnecessary and unauthorized change, said County Commissioners exceeded their jurisdiction, if any; and the same was an abuse of discretion.

Said resolutions of May 11, 1920, also, waived contribution from Springfield and Sycamore townships, in which said Section X is situated, of their share of the cost of improving said section, only, of said road, but did not add the same nor any part thereof, nor any of the county's share of said cost and expense to the amount to be assessed upon property owners, and provided that ten per cent only, and no more, of said total cost and expense, excepting therefrom the cost of bridges and culverts, should be assessed against the real estate

within one-half (½) mile of both sides of said section of said Inter-[fol. 49a] county Highway, whereas, under the law applicable thereto, the same could not be assessed, if at all, except upon property abutting upon the improvement.

Said resolutions, also, instead of providing that the assessment of said ten per cent only, of the total cost and expense of improving said section, excepting therefrom the cost of bridges and culverts, should be apportioned by the County Surveyor, upon his own judgment, according to the benefits accruing to the land located within one-half (½) mile, as aforesaid, actually and expressly directed the arbitrary division of the same into three (3) equal parts, one of which parts, or three and one-third per cent of the total cost of said improvement, should be assessed against the property abutting upon said Section X in proportion to the number of front feet contained in each part, parcel, tract, and lot, abutting upon said Section X; and that the second part thereof, or three and one-third per cent of the total cost of said improvement, should be assessed against all the property within one-half (½) mile of both sides of said Section X, in the proportion to the acreage or area thereof; and finally, that the remaining one-third (⅓) of the same, or three and one-third per cent of the total cost of said improvement should be assessed against all of the property within one-half (½) mile of both sides of said Section X in proportion to the tax valuation of each part, parcel, tract, and lot involved, as the same appears on the tax duplicate of said county.

On the same day, May 11, 1920, said County Commissioners, by [fol.49b] unanimous vote, adopted resolutions purporting to notify said property owners, in manner and form more fully hereinafter described, and providing for the publication of said resolutions, and for the presentation and hearing of claims for compensation.

Thereafter, on May 28, 1920, said County Commissioners, by unanimous vote, adopted resolutions determining to proceed with the improvement, of said section only of said Intercounty Highway. Said resolutions, instead of requiring the County Surveyor of Hamilton County, Ohio, to make a tentative apportionment of the amount to be paid by the owners of abutting property only; and instead of directing him to make the same, upon his own independent judgment, according to the benefits accruing to the land to be assessed, expressly directed him to make, by actual view, an estimated assessment upon the lands within one-half (½) mile, as aforesaid, in accordance with the arbitrary resolution theretofore unanimously dopted by the Board of County Commissioners, to-wit, the resolutions of May 11, 1920, as above described.

Thereafter, on June 22, 1920, said County Commissioners, by Unanimous vote, adopted a resolution, reciting that the County Surveyor had filed an estimated assessment against the property lying within one-half (½) mile of either side of said Section X only, and had proportioned the total amount to be raised by assessing said property in accordance with the arbitrary plan theretofore adopted by said Board of County Commissioners. Said resolution thereupon proceeded to assess ten (10) per centum only and no more, of the

[fol. 50] entire cost and expense of said improvement, being the sum of $15,607.15, against the so-called "abutting property owners" lying within one-half (½) mile of both sides of said Section X of said Intercounty Highway, according to the arbitrary plan previously adopted on May 11, 1920, as above described.

Said assessment was not apportioned according to the benefits accruing to the land so located. The use of the word, "abutting" in said resolution was a misrepresentation of fact, and an attempt at an evasion of the law.

Said resolution of June 22, 1920, also provided for the advertisement of said assessment, without describing the lands lying within one-half (½) mile on both sides of said Intercounty Highway, Section X except as such, and without naming the several owners thereof, to many of whom, including the plaintiff, the name, number and section of said Intercounty Highway, having been but recently given, were unknown. The publication of said resolution was made accordingly, and was evasive of the law and altogether inadequate for the due notification of said property owners, including the plaintiff. The aforesaid resolution of May 11, 1920, purporting to notify property owners, and the publication thereof, were defective, evasive and inadequate in the same manner for the same reasons, and to the same extent. The plaintiff had no actual knowledge or notice of any of the proceedings alleged in this petition, or of said assessment, until after the first day of December, 1920.

Thereafter, on July 9, 1920, said Board of County Commissioners, [fol. 51] by unanimous vote, adopted a resolution confirming said assessments, and certifying the same to the Auditor of Hamilton County, Ohio, and providing that all unpaid assessments should be placed on a special duplicate, with interest added thereto, to be paid in twenty (20) equal instalments, one every six (6) months, beginning Dec. 20, 1920, during ten (10) years. Said resolution contained a recital that such apportionment was according to the benefits which will result in said real estate; but said recital was evasive of the law applicable thereto, and a misrepresentation of fact and of the mode and manner, in which said assessments had been levied, as hereinbefore described, and as appears upon the face of the proceedings.

Said resolution of July 9, 1920, made no provision for the payment of said assessments within a limited time without interest, at the option of the property owners; but ostensibly provided for said interest at the same rate, six (6%) per cent., as that upon bonds which it was provided, were to be issued and sold for the initial payment of the cost of said improvement, and that said assessments were for the payment of said bonds with interest, when due. Said interest, nevertheless, as carried into said assessment and certified, is in fact, nearly twice as much as is necessary for such purposes and as authorized by law and is usurious, and of the rate of ten and eight-tenths per cent.

Seven and ten hundredths (7.10) acres of plaintiff's nine (9) acre tract, above described, have been assessed, as aforesaid, in the total

sum of $239.28 of which $89.73 is interest, and of which the sum [fol. 52] of $11.97, is the first of twenty semi-annual payments entered by the Auditor of Hamilton County, Ohio, upon the special and general duplicates as aforesaid. Since the filing of the original petition herein two further equal instalments have become due and are now payable unless enjoined.

[fol. 53] Plaintiff has not paid any part of said assessment or any instalments thereof. The work upon said improvement was not begun until long after the commencement of this suit, and the obtaining of a preliminary restraining order.

So much of plaintiff's said land, as is assessed as aforesaid, lies and abuts upon the north side of a county road situated in a direct line less than one-half (½) mile north of said Intercounty Road No. 46, Section X. None of said land can use said Section X except by first traversing more than half a mile in fact nearly a mile of connecting roads. Said county road approximately parallels said Intercounty Road No. 46, Section X, throughout its entire length, with the exception of converging in a southerly direction toward the [fol. 54] same near its eastern terminus in Intercounty Road No. 19, and with the further exception of about a quarter of a mile in its western half, during which it diverges in a northerly direction, toward the village of Glendale. The result is that said parallel county road is shorter by half a mile between Glendale and said Intercounty Road No. 19, at its intersection with said Section X, than is the route between said points over said Intercounty Road No. 46, Section X. Plaintiff's said lands are nearer Intercounty Highway No. 43 at the village of Glendale by the parallel county road, on which they abut than they are by the use of said Intercounty Highway No. 46, Section X, by more than a mile; and nearer Intercounty Highway No. 19, at its intersection with said Section X, by half a mile. No special benefits whatsoever will accrue to plaintiff's said lands from the improvement of Intercounty Road No. 46, Section X, but on the contrary, the same is, and will be a detriment to said lands and to plaintiff, for the reason that said parallel county road, upon which her lands abut, also, needs improvement, and a large part of the land, upon which the cost and expenses thereof can be assessed, is already assessed for the improvement of Intercounty Highway No. 46, Section X, which fact the County Surveyor, in making any future estimated assessment for the improvement of said parallel county road, may take into consideration, in apportioning such an assessment. Any future assessment, therefore, for the improvement of said parallel county road would have to fall to a greater extent than otherwise, upon plaintiff's abutting lands. Furthermore, any [fol. 55] assessment therefor, under the law applicable thereto, would have to be without state aid, and in a much larger proportion of the total cost of the improvement, than in the case of said Intercounty Road No. 46, Section X. The improvement of said parallel county road will therefore be very much delayed, if not entirely prevented.

Said detriment very much outweighs any special benefit that might be imagined for the lands abutting on said parallel county road, including especially, those of the plaintiff.

Said Board of County Commissioners, in planning, directing, confirming, and assessing one-third (1/3) of said amount to be assessed according to value, as above described, included therein, not only the value of the land itself as valued for taxation, but, also, that of [fol. 56] the buildings and improvements thereon, as separately appraised and separately carried out, upon the tax duplicate. In so doing, it so clearly failed to assess according to benefits, some of the land which does not abut upon said Intercounty Highway No. 46, Section X, but does abut upon said parallel county road, including the above described 7.10 acres of the plaintiff, that the aggregate assessment upon the latter is actually greater than that upon equal areas of some of the lands abutting upon said Intercounty Highway, Section X. Furthermore, to direct the inclusion of the value of buildings and improvements as a necessary part of an assessment according to benefits was wholly unauthorized by law.

Upon said nine acre tract, of which said 7.10 acres assessed, are a part, plaintiff is taxed upon said duplicate on a valuation for the land alone of $1,590.00, and for the buildings and improvements thereon of $8,650.00, making a total of $10,240.00. Said 7.10 acres are a little more than seven ninths of said nine acres. Said assessment according to value thereon, was based upon the same ratio, a little more than seven ninths of said total valuation for land and buildings, that is, of $10,240.00.

[fol. 57] Said Board of County Commisioners, in initiating and continuing said proceedings, without a petition; in adopting a resolution that the public interest demanded the improvement of the whole of Intercounty Highway No. 46, and proceeding thereupon to improve Section X only thereof; in the abuse of discretion, above described; in assessing plaintiff's land not abutting upon the improvement, but upon a parallel county road, and not lying within a half mile thereof by the nearest connecting public roads; and not benefited thereby; and upon an arbitrary plan which was not according to benefits accruing to the same; and in instructing the County Surveyor, as it did, instead of merely causing him to make a tentative apportionment according to benefits; and without adequate notice to, or actual knowledge of plaintiff; and in including the value of buildings and improvements in its assessment; and in the deprivation of said option; and in said usurious overcharge of interest; all as above described; and in assessing any part at all of the cost of an improvement of an Intercounty Highway upon lands supposed to be benefited thereby; acted in each and every one of said specifications without jurisdiction or authority, and all of said assessments on plaintiff's said property are illegal and void.

[fol. 58] If said assessments are enforced, plaintiff will be deprived of her property for public use, without compensation and so far as abutting property owners may have been relieved from assessment, for private use, and without due process of law, in violation of her rights as the owner thereof, and in violation of Article 1, Section 19, of the constitution of the State of Ohio and of the fourteenth amendment to the constitution of the United States of America. If such inadequate notice and publication as was

made and is alleged, and if such deprivation of said option an such overcharge of interest, as are alleged, are justified by the mean ing of the sections of the General Code, applicable thereto, said se tions are also in violation of the same constitutional provision including also that which secures to her the equal protection of th laws. And finally the provisions of the General Code requiring all events the assessment upon property owners of ten (10) pe cent. of the cost of the improvement of Intercounty Highways ar in violation of Article 1, Section 19 of the constitution of the Stat of Ohio.

Said assessment, as it appears upon the special duplicate in th office of the Auditor of Hamilton County Ohio, and the first fou instalments thereof, as they appear upon the general duplicate said county, now in the hands of the defendant for collection, a a charge and lien upon plaintiff's said real estate, with all the powe given defendant by law for distraint and sale in the case of deli quent taxes, and with all the penalties thereunto attached. Unle [fol. 59] defendant is enjoined by this court from the collection the same, plaintiff, to avoid said penalties and to avoid becomin delinquent for her general taxes, will be obliged to pay each o of said instalments as it comes due, under protest, and to sue f its recovery. This will cause a multiplicity of suits and a clou will be placed upon her title and she will suffer great and irreparab loss and injury for which sho has no adequate remedy at law.

Wherefore plaintiff prays that the defendant, Louis J. Huwe, treasurer of Hamilton County, Ohio, be temporarily restrained fro collecting any and all of the instalments of each and every one said assessments, and that, upon final hearing hereof, he and h successors, be perpetually enjoined from collecting or enforcing th same, and the whole of each and every one of said assessments, a for all other relief necessary and proper in the premises.

Mortimer Matthews, Attorney for Plaintif

Jurat showing the foregoing was duly sworn to by Mariann Matthews omitted in printing.

[fol. 60] IN COMMON PLEAS COURT

ORDER FOR TEMPORARY RESTRAINING ORDER

Forty cents due notary.

Let temporary restraining order issue as prayed for. Bond i the sum of five hundred dollars to the satisfaction of the clerk.

Roettinger,

IN COMMON PLEAS COURT

PRÆCIPE FOR SUMMONS

Please issue summons against the defendant, indorse action for equitable relief.

Mortimer Matthews, Attorney for Plaintiff.

IN COMMON PLEAS COURT

SUMMONS & SHERIFF'S RETURN

THE STATE OF OHIO,
Hamilton County, ss:

To the sheriff of the county of Hamilton:

You are commanded to notify Louis J. Huwe, as Treasurer of Hamilton County, Ohio (amended and supplemental petition), defendant, that he has been sued by Marianna Matthews (amended and supplemental petition), plaintiff, in the Court of Common Pleas of Hamilton County, and that unless he answer by the fourth day of February A. D., 1922, the amended and supplemental petition of the said (amended and supplemental petition), plaintiff against him filed in the clerk's office of said court, such amended and supplemental petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 16th day of January A. D., 1922.

[fol. 61] Witness my hand and the seal of the said court at Cincinnati, this 5th day of January A. D., 1922.

Geo. W. Tibbles, Clerk of the Court of Common Pleas of Hamilton County, Ohio, by Albert Swing, Deputy. (Seal.)

Cincinnati, Ohio, January 6, 1922.

Served the within named defendant, Louis J. Huwe as Treasurer of Hamilton County, Ohio, by delivering to him personally, a true copy of this writ with all the indorsements thereon.

Ferd Bader, Sheriff Hamilton County, Ohio, by John Krieg, Deputy.

Seriff's fees, 91 cents.

IN COMMON PLEAS COURT

ANSWER TO AMENDED PETITION—Filed January 7, 1922

The defendant, Louis J. Huwe, admits that he is the duly elected, qualified and acting Treasurer of Hamilton County in the State of

Ohio, and was such at all times mentioned in the petition. That the tax duplicate for the year 1921 is in his hands as treasurer for the collection of taxes and assessments thereupon entered.

[fol. 62] Further answering, the defendant herein denies each and every allegation in said petition contained not herein specifically admitted to be true.

Louis Capelle, Pros. Atty.; C. S. Durr, Asst. Pros. Atty., Attorneys for Defendant.

Jurat showing the foregoing was duly sworn to by Louis J. Huwe omitted in printing.

[fol. 63] IN COURT OF APPEALS

MINUTE ENTRY OF JUDGMENT

Transcript and original papers filed April 5, 1922, Common Pleas Court, No. 177017.

1923, Apr. 25th (Jan. Term).—Minute 114. Decree finding for defendant and enjoining defendant from collecting interest on deferred instalments of assessments in excess of six per cent, plaintiff to pay two-thirds and defendant one-third of the costs in the Court of Common Pleas and each party to pay one-half costs in Court of Appeals.

This cause coming on to be heard on appeal from a judgment of the Court of Common Pleas of Hamilton County, Ohio, the pleadings and the evidence and having been argued by counsel and being fully advised in the premises the court finds:

1. That the County Commissioners of Hamilton County, Ohio, were authorized to levy assessments on the property in question; that their proceedings were had in conformity to law and that the assessments are valid.

2. That said assessments covering a period of ten (10) years, except so much of the interest included therein as is in excess of the rate of six per cent (6%) per annum, are a lien on the Real Estate.

[fol. 64] 3. That so much of the interest charges on deferred instalments as is in excess of the rate of six (6%) per cent per annum, the same rate of interest borne by the bonds, issued in anticipation of the collection of such assessments, is illegal and should be enjoined.

4. The court further finds that as to all matters except the interest on deferred instalments of assessments in excess of six (6%) per cent on each instalment from the date of the bonds to the time of the payment of the deferred instalment, the plaintiff is not entitled to an injunction as prayed for.

Wherefore it is ordered, adjudged and decreed by the court that the defendant, Louis J. Huwe, Treasurer of Hamilton County, be,

and he, hereby is forever enjoined from collecting any interest on deferred instalments of assessments against the Real Estate owned by the plaintiff within the assessment area of the Glendale and Milford Road, Section X, in excess of six per cent (6%) from the date of the bonds issued in anticipation of the collection of said assessments to the date of the payment of said deferred instalments of assessments.

Coming now to assess the costs of this action, the court being fully advised, does hereby, order, adjudge and decree that two-thirds of the costs of this action, as incurred in the Court of Common Pleas, shall be paid by the plaintiff herein, and one-third by the defendant, and that one-half of the costs of this action incurred in this court shall be [fol. 65] paid by the plaintiff herein, and one-half thereof by the defendant.

And to all of the foregoing findings and judgment except so much thereof as enjoins the collection of a part of the interest on deferred instalments of assessments the plaintiff accepts.

May 8th.—Bill of Exceptions filed.

May 8th.—Waiver of Notice and consent to immediate transmission of Bill of Exceptions filed.

May 8th.—Bill of Exceptions transmitted to Judges Cushing, Buchwalter and Hamilton.

May 8th.—Bill of Exceptions received from Judges Cushing, Buchwalter and Hamilton signed and allowed.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 66] IN COURT OF APPEALS

[Title omitted]

Bill of Exceptions—Filed May 8, 1923

The defendant, hereby, waives time, notice, and the filing of objections and amendments hereto, and consents to the immediate transmission of this Bill of Exceptions to the trial judges.

Chas. S. Bell, Pros. Atty.; Chester S. Durr, Asst. Pros. Atty., for Defendants.

[fol. 67] Transmitted to Judges Cushing, Buchwalter and Hamilton, May 8, 1923.

Geo. W. Tibbles, Clerk, by Albert Swing, Deputy.

Received from Clerk of Court of Appeals this 8th day of May, 1923.

Wade Cushing, Judge. Robert Z. Buchwalter, Judge. Francis M. Hamilton, Judge.

Received from Judges Cushing, Buchwalter and Hamilton, May 8, 1923.

Geo. W. Tibbles, Clerk, by Albert Swing, Deputy.

Be it remembered that these two causes, the first, in which Mortimer Matthews is plaintiff and Louis J. Huwe, as Treasurer of Hamilton County, Ohio, is defendant, No. 2010, and the second, in which Marianna Matthews is plaintiff and Louis J. Huwe, as Treasurer of Hamilton County, Ohio, is defendant, No. 2011, came on together for trial and hearing in this Court of Appeals of Hamilton County, Ohio, in the January term of 1923 thereof, to-wit, on the 19th day of March, 1923, before the Honorable Wade Cushing, the Honorable Robert Z. Buchwalter, and the Honorable Francis M. Hamilton, judges of said court, the Honorable Wade Cushing presiding.

Thereupon the following proceedings were had: it was agreed in open court by, and between, the parties to said causes, and their coun- [fol. 68] sel, Mortimer Matthews, for the plaintiffs, and Chester S. Durr, for the defendant, that said two causes should be tried and heard together upon the transcript of evidence and exhibits at the trial of said causes in the Court of Common Pleas of Hamilton County, Ohio, in the January term, 1922, before the Honorable Robert A. Le Blond, Judge.

It was, however, a part of said agreement that the assessment roll referred to on pages 67 and 68 of said transcript, and identified as plaintiffs' Exhibit 8 attached to said transcript and made a part thereof was not a part of the evidence submitted to this court, but only so much of the contents thereof as is testified to by one or more of the witnesses in said transcript of evidence.

It was, also, however, a further part of said agreement that the plat referred to at pages 100 and 101 in said transcript, and marked defendant's Exhibit (1) attached thereto and made a part thereof was not a part of the evidence before this court, but only such parts of the contents thereof as are testified to by one or more of the witnesses in said transcript of evidence.

It was, also, a part of said agreement that the certified copy of the proceedings of the County Commissioners referred to in said transcript at pages 88 and 89 and marked plaintiffs' Exhibit (11) attached thereto and made a part thereof was not a part of the evidence before this court, but that there was substituted therefor a true copy of said certified copy with the omissions noted at pages 10, 14, 24, 25, 26, 27, and 28, 30, 31, 32, 33, and 34, and 39, 40, 41, 42, and 43, and 46, 47, 48 and 49.

[fol. 69] It was also a part of said agreement that said omission at page 10 was the newspaper printed copy of the resolution adopted May 11, 1920, set forth on pages 8 and 9 of said copy, and that the omissions at page 14 were of the certified copies of the resolution adopted May 28, 1920, as set forth on the previous page which were sent to A. R. Taylor and E. A. Gest; that the omissions at pages 24 to 28, inclusive, were resolutions for the issuance and sale of the bonds of Hamilton County in anticipation of the collection of the aggregate unpaid assessments referred to in the resolution at page 20; that the omissions at pages 30, 31, 32, 33 and 34, were certified copies of the resolutions for the issuance and sale of said bonds; that the omissions at pages 39 and 40, 41, 42 and 43, were the

same; that the omissions at pages 46, 47, 48 and 49, were of the proofs of advertisements of said bonds.

Said substituted copy of said plaintiffs' Exhibit 11, is thereto and hereto attached and made part hereof identified in the same manner as plaintiff's Exhibit 11.

The transcript of evidence and exhibits, all of which are hereto attached and made part of this Bill of Exceptions with their substitutions and omissions, and the foregoing agreement with reference thereto, and as to what they are, were all the evidence offered and submitted to this court in the trial of these two causes tried and heard together as aforesaid.

And wherever in said transcript, it is noted that the plaintiffs offered any evidence which was rejected or ruled out, the same [fol. 70] was, also, the action and ruling of this court, accompanied by the same offers by the plaintiffs as to what was expected to be proved; and this court, also, allowed the same exceptions to its said rulings as noted in said transcript with reference to the action of the Court of Common Pleas.

And wherever in said transcript, it is noted that testimony or evidence offered by the defendant was admitted over the objection, and subject to the exception, of the plaintiffs, the same was, also, the action and ruling of this court; and this court, also, allowed the same exceptions to its said rulings.

And the court having taken said two causes under advisement afterwards found, to-wit, on the 25th day of April, 1923, that as to all matters, except the interest on deferred instalments of assessments in excess of six per cent. on each instalment from the date of the bonds to the time of the payment of the deferred instalment, the plaintiffs were neither of them entitled to an injunction as prayed for, and to said findings, the plaintiffs, and each of them, excepted. And the court, on said date, rendered and entered judgments accordingly in said two causes as more fully appears by the journal entries of said findings and judgments in said two causes. And to all said findings and judgments, except so much thereof as enjoins the collection of a part of the interest on deferred instalments of assessments, the plaintiffs, each in his own case, excepted; and they each severally now come and file and present this, his and her, Bill of Exceptions thereof, and pray each [fol. 71] severally that it may be signed and made part of the records in each of said two causes, all on this 8th day of May, 1923.

In witness whereof, and this Bill of Exceptions, with the consent of the defendant by his attorney indorsed thereon, immediately on the filing thereof having been transmitted to the trial judges, they as hereinbefore named, have hereunto set their hands and signed their names as such judges of this court on this 8th day of May, 1923.

Wade Cushing, Judge. Robert Z. Buchwalter, Judge.
Francis M. Hamilton.

[fol. 72] [Title omitted]

TRANSCRIPT OF EVIDENCE FROM COMMON PLEAS COURT

Apperances: for plaintiff, M. Matthews; for defendant, L. H. Capelle and C. H. Durr.

Be it remembered that this cause came on for hearing in this Common Pleas Court of Hamilton County, Ohio, in the January Term, A. D. 1922, thereof, to-wit, on February 20, 1922, before The Honorable Robert A. LeBlond, Judge.

Thereupon the following proceedings were had:

By Mr. Matthews: If your Honor, please I think it is agreeable with the County Prosecutor the two cases may be tried together. The other case is that of Marianna Matthews.

By the Court: The record taken in the one case shall be the record in both cases?

[fol. 73] By Mr. Matthews: Yes, sir; there is only a slight difference.

By Mr. Durr: The defense is ready to proceed on both cases.

Thereupon the plaintiff to maintain the issues on his part, called as a witness.

J. A. STEWART, called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Matthews:

Q. You are a civil engineer?
A. Yes, sir.
Q. In this county?
A. Yes, sir.
Q. How long have you been such?
A. About forty years.
Q. Did you at my request take some measurements with reference to the improvement of the Glendale and Milford Intercounty Highway some few weeks ago?
A. Yes, sir, I did.
Q. These were the measurements mainly showing the location of the improvements on the property of Mortimer Matthews?
A. Yes, sir.
Q. And the distances from them to the Glendale and Milford Road, were they?
A. Yes, sir.
Q. Both in a direct line and according to roads of nearest access?
A. Yes, sir.
[fol. 74] Q. Did you make a plat of your survey on that occasion?
A. I did.

Q. Is this a blueprint of it, Mr. Stewart?
A. Yes, sir.
Q. Did you measure the distance from the Glendale and Milford Road along the line of the road of the canal?

(Objected to by counsel for defendant.)

A. Here up to here. (Indicating.)

By Mr. Matthews: I merely want to show on the question of benefits how far this property is by modes of access to the Glendale and Milford Road.
By the Court: The objection is overruled for the present subject to further decision of the court.

(Counsel for defendant excepted to the ruling of the court.)

A. The distance from the Milford and Glendale Road to the point—
Q. Along the canal road.
A. The half mile comes at No. 2 and from No. 2 to No. 5 which was the nearest point of access is 1,700 feet or .36 of a mile.

(Objected to by counsel for defendant.)

By the Court: The same ruling.

By Mr. Matthews:

Q. Did you measure the distance from the Glendale and Milford Road along the Martin Road marked on the west end of this blueprint?
[fol. 75] A. Yes, sir; from 3 to 4 is one-half mile to the Glendale and Milford Road which is the nearest road and from 4 to 5 is 2,390 feet or .45 of a mile.
Q. Assuming that the property of Mortimer Matthews extends from the section line at the extreme right of the plat passed the railroad and the canal and through to within a short distance of the section line, the west section line, is there any point of Mortimer Matthews' property, including that marked "Mortimer Matthews" on this blueprint, is there any point of any of that property which is within a half mile by the nearest public road to the Glendale and Milford Road?

(Objected to by counsel for defendant.)

By the Court: That may go in for the present subject to further ruling.

(Counsel for defendant excepted.)

By Mr. Durr: I want an objection to all the questions and an exception.

(Question read by the stenographer.)

"Q. Assuming that the property of Mortimer Matthews extends from the section line at the extreme right of the plat passed the railroad and the canal and through within a short distance of the section line, the west section line, is there any point of Mortimer Matthews' property, including that marked 'Mortimer Matthews' on this blueprint, is there any point of any of that property which is within a half mile by the nearest public road to the Glendale and Milford Road?"

[fol. 76] A. There is not.

(Objected to by counsel for defendant. Objection overruled, subject to future decision, and counsel for defendant excepted.)

By the Court: Are you going to put the plat in?

By Mr. Matthews: I am not through with it yet. I will offer the plat now.

(Marked plaintiff's Exhibit 1. Attached hereto and made a part hereof.)

Q. Mr. Stewart, did you take measurements in a direct line from the Glendale and Milford Road to the improvements marked here on the farm of Mortimer Matthews, on the 87.59 acre tract of Mortimer Matthews?

(Objected to by counsel for defendant. Objection overruled and counsel for defendant excepted.)

By the Court: This all goes in subject to future ruling.

By Mr. Matthews:

Q. Where did you find that the half mile line came from the Glendale and Milford Road with respect to these improvements?

A. The half mile line from the Glendale and Milford Road came as shown by the dotted line on this map which is parallel and a half mile away from the Glendale and Milford Pike. This line is just half a mile from the Glendale and Milford Pike.

[fol. 77] Q. What improvements on the 87.59 acre tract did you find north of that line and what improvements south?

(Objected to by counsel for defendant. Objection overruled and counsel for defendant excepted.)

A. A poultry house, and a dwelling house and barn north of the half mile line. There is a house and two barns south of the half mile line.

By the Court:

Q. Where are your compass points on this map?

A. This is due north.

By Mr. Matthews:

Q. What are the points of the compass on this plat, Mr. Stewart?

A. The top of the plat is the north, bottom of the plat south. The top of the plat is due north.

By the Court:

Q. When you say the bottom of the plat you mean the part along the Glendale and Milford Pike?
A. Yes, sir, that is the bottom of the plat.

By Mr. Matthews:

Q. Did you measure these buildings, any of them?
A. Yes, sir, measured them all.
Q. Have you got a memorandum of those measurements?
A. I haven't it with me; I have it in the rough notes we get. The scale will show the size.

[fols. 78-99] By Mr. Durr: I want to object to that line of inquiry.
By the Court: You have a general objection and exception. It is all going in subject to the future decision of the court.

[fol. 100] MARIANNA MATTHEWS, called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Matthews:

Q. You are the plaintiff in one of the cases now being heard in this court?
A. I am.
Q. Are you a citizen of Hamilton County?
A. I am.
Q. In the State of Ohio?
A. I am.
Q. Are you the owner of the nine acre tract of land marked on [fol. 101] this blueprint Exhibit 1, this nine acre tract of land marked there "Marianna Matthews?"
A. I am.
Q. And the assessment on that is for 7.10 acres on the front of that nine acre tract?
A. Yes.
Q. I exhibit to you Hamilton County real estate tax bill No. 1249 against you. It is marked plaintiff's Exhibit 2. Was this the first tax bill that you received for this assessment which is in suit in your case?
A. This was a year ago last fall, the December taxes. Yes, I think it was. I think I never saw anything like that in red before.

By Mr. Matthews: I will offer that tax bill in evidence.

(Marked plaintiff's Exhibit 2. Attached hereto and made a part hereof.)

Q. When did you first know of any improvement of the Glendale and Milford Road and of any assessment against you for the work on that road?

A. This was the first I knew of any assessment against me. I heard the road was going to be improved. I did not know I was going to be assessed for it.

Q. When did you hear it was to be improved?

A. That fall I was told by someone that works in the family that the road was going to be improved. In fact I think I saw some hauling there, but I did not know anything about our being as-
[fols. 102-118] sessed for it or the improvement until you brought that home.

Q. Do you remember when I brought that home to you?

A. Shortly before the time the check was made out. I could not say the date, sometime that fall.

Q. It was not before the first of December. Do you think it was?

A. I don't think it was before the first of December.

Q. When did you first hear of the name Glendale and Milford Road applied to this, what is known as the Glendale and Milford Road on Exhibit 1?

A. About that, I think it was about that year, sometime that summer. We always called it the White Road or Skillman Road. My first knowledge of it was when the signs were put up by the Automobile Club, was it, sometime that summer I think.

By Mr. Durr: I move that the time be laid more definitely.

By the Witness:

A. I beg your pardon. In the summer, 1920. I may correct that statement. I did not see it until the spring of 1921.

By Mr. Matthews:

Q. That sign?

A. Yes, sir, that is the time I first saw it.

Q. Did you ever hear the name Glendale and Milford Road applied to that before you saw this tax bill?

A. I don't think I have.

[fol. 119] CHARLES T. MCGLONE, called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Matthews:

Q. Your business?

A. I am title examiner for The Title Guarantee & Trust Company.

Q. How long?

A. I have been there ten months.
Q. How long have you been examining titles in this county?
A. Ten months in this county
Q. Did you at the request of Mortimer Matthews examine the assessments on Section X of the Glendale and Milford Road of the Intercounty Highway?
A. I did.
Q. Did you make a written report to Mr. Matthews?
A. Yes, sir, I did.
Q. Is this the report? (Showing witness paper.)
A. Yes, sir, that is the report.
Q. Are these assessments correct as taken from Book O of assessments in the Auditor's Office of the Glendale and Milford Intercounty Highway?
A. Yes, sir.
Q. What does the first page contain, assessment on what property?
A. The first page contains the assessments on the property of Mortimer Matthews and wife Marianna Matthews.
Q. The second page?
[fol. 120] A. The second page is a report approximately of the same area of other lands in the same vicinity within the limits of that assessment.
Q. What names are on the second page?

(Objected to by counsel for defendant.)

By Mr. Durr: I am willing that the assessments against Mortimer Matthews are correct. I agreed to that only.
By the Court: The first page may go in without objection. Pages two and three are objected to, but admitted into evidence subject to future ruling of the court.

(Marked Plaintiff's Exhibits 3, 4 and 5. Attached hereto and made a part hereof.)

By Mr. Matthews:

Q. Have you today examined the assessment on A. E. Gregory or Amelia E. Gregory?
A. Yes, sir, I did.
Q. What was her piece described as on the assessment roll?
A. Described as two and one-half acres, Section 35, Township 4, Fractional Range 1, South Half.
Q. What is the assessment on her two and one-half acres?

By the Court: Objection is made to that and the court will reserve its ruling and let the question be answered.

A. Assessment $21.19, Interest $12.71.
[fol. 121] Q. The aggregate?
A. $33.90.

By Mr. Durr: We are objecting, if the court please, on this method of establishing assessment on other property. Our agreement was only on the Matthews' property.

By Mr. Matthews: I thought it would save trouble.

By Mr. Durr: I will not waive anything.

No cross-examination.

By Mr. Matthews: I offer in evidence a certified transcript of certain resolutions of the County Commissioners in regard to the Glendale and Milford Road, Section X.

By Mr. Durr: If the court, please, this record presumes to be a true and correct transcript of the resolutions and we submit as such it is valueless. What will be necessary for the correct determination of this case will be a true and correct transcript of the proceedings and I find in the records submitted there are numerous subjects which are necessary ones for a proper and legal procedure which have been omitted. I have no hesitancy in offering to you a true and correct transcript of the proceedings, as I intend to offer it when the point arrives.

By the Court: You have the complete record?

[fol. 122] By Mr. Durr: Yes, sir, in my hand, given to the bond buyers and examined by their attorneys. I will offer it at the proper time.

By Mr. Matthews: Have you any objection if I offer it?

By Mr. Durr: No.

By Mr. Matthews: I would like to look over it to-night.

By Mr. Matthews: I desire to offer a certificate of Albert Rheinhardt, Clerk of the Board of County Commissioners of Hamilton County, dated November 29, 1921.

(Marked Plaintiff's Exhibit 6. Attached hereto and made a part hereof.)

Further hearing adjourned until 10 A. M. Tuesday, February 21, 1922.

Morning Session,
February 21, 1922—10 a. m.

WILLIAM H. MEINHARDT, called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Matthews:

Q. Your business?

A. Deputy Auditor.

Q. Have you brought with you under the subpœna duces tecum to the Auditor the Special Assessment Docket O of the Glendale and Milford Intercounty Highway, Section X?

[fol. 123] A. Yes, sir.

Q. Will you open the book at the place. This Section X, the assessments on Section X occupy between what pages on this Special Assessment Docket, do you call it?

A. Assessment Book O.

Q. Between what pages does the assessment——

A. The Glendale and Milford Road lies in two townships; part in Springfield and part in Sycamore, begins with Mortimer Matthews 888 and 890.

Q. It begins before Mortimer Matthews?

A. Yes, pages 880 up to 905.

Q. 880 is the very first assessment of this Intercounty Highway?

A. Page 800 is where it starts. We entered it in two parts, that in Springfield Township endeavoring to keep it separate from the Sycamore Township to get it on the correct duplicate.

(Counsel for defendant objected as to the assessment on property other than that belonging to the plaintiffs.)

By Mr. Matthews:

Q. And goes through at the end of Sycamore Township to what page?

A. 905.

By Mr. Matthews: Now, if your Honor please, I offer all these assessments in evidence as identified by the deputy from the Auditor's office.

By Mr. Durr: The defendant will admit the assessments levied [fol. 124] against the properties of Mortimer Matthews and Marianna Matthews in the words and figures set out in the petition are the same as they appear on the assessment roll of the Auditor.

By Mr. Matthews:

Q. Look on page 892 of Book O and tell the court what the item entered there is, the first item against Henry Moeller, Archbishop.

(Objected to by counsel for defendant. Objection overruled subject to future ruling of the court, and defendant excepted.)

A. The first item on page 892 reads "Lot No. 4, 416.46 feet were assessed and the assessment was $134.86, plus interest $80.92, making a total of $215.78.

(Counsel for defendant moved to strike out the answer. Motion overruled subject to future ruling of the court and counsel for defendant excepted.)

Q. It is described as 7.43 acres, assessment $84.16, interest $50.50, total $134.66?

A. No.

Q. I had the wrong one. The total is $215.78?

A. Yes.

Q. The next item on the page in the name of Henry Moeller, Archbishop.

(Objected to by counsel for defendant. Objection overruled subject to future ruling of the court and counsel for defendant excepted.)

[fol. 125] A. The assessment is for 321½ feet.

Q. How many acres?

By the Court: The question is to read the whole entry on your books.

A. I might suggest this copy on my book is a copy of this, except I had to add a description on here so we could locate it on the tax duplicate. Therefore, it does not always correspond. Here is the original entry.

By Mr. Matthews: I will take those up later.

By the Witness: I will read what is on this book.

By Mr. Durr: I object to the voluntary answers. I move to strike out.

By the Court: That part of the answer made and objected to may go out.

By Mr. Matthews:

Q. What is the next item?

A. Assessment $121.26 described as 1-4-35, which means range, town and section south half quarter.

Q. What is the acreage?

A. Known on the tax duplicate as ten acres, 321.50 feet. The assessment is $121.26, interest $72.76, total $194.02.

(Counsel for defendant moved to strike out the answer. Motion overruled for future ruling of the court. Counsel for defendant excepted.)

[fol. 126] Q. What is the next?

A. 1-4-35. Range 1, Town 4, Section 35, south part of Levi White, Lot No. 2 on the duplicate, recognized as 7.68 acres. That assessment is $5.08, interest $3.05, total $8.13.

(Counsel for defendant objected and moved to strike out the answer. Objection and motion overruled for future ruling of the court and counsel for defendant excepted.)

Q. The next one.

A. Page 893, 1-4-35, Levi White, Lot No. 3, known on the tax duplicate as 7.68 acre tract. Assessment $39.65, interest $23.79, total $63.44.

(Counsel for defendant objected and moved to strine out the answer. Objection and motion overruled for future ruling of the court and counsel for defendant excepted.)

Q. The next one.

A. 1-4-35, range, town and section, south quarter of Levi White

Lot No. 4, acres 7.55. That is simply the description on the tax duplicate. Assessment $38.91, interest $23.35, total $62.26.

(Counsel for defendant objected and moved to strike out the answer. Objection and motion overruled for future ruling of the court and counsel for defendant excepted.)

Q. The next.
A. 1-4-35, south quarter, Lot No. 5, Levi White, on the tax duplicate known as 7.43 acres. There the feet is shown 239.94 feet. Assessment $84.16, interest $50.50, total $134.66.

[fol. 127] (Counsel for defendant objected and moved to strike out the answer. Objection and motion overruled for future ruling of the court and counsel for defendant excepted.)

Q. The next one.
A. 1-4-35, south half of Levi White, Lot No. 1, 6.14 acres on the tax duplicate. Assessment $44.41, interest $26.65, total $71.06.

(Counsel for defendant objected and moved to strike out the answer. Objection and motion overruled for future ruling of the court and counsel for defendant excepted.)

By Mr. Durr: If the court please, my objection is made to all the questions, which are overruled, exception taken and motion to strike out which is overruled and exception taken.
By the Court: That is understood.

By the Witness:

A. 1-4-35, southeast quarter, Lot No. 2, Levi White, recognized on the tax duplicate as .18 acres. Assessment 75 cents, interest 45 cents, total $1.20.

By Mr. Matthews:

Q. The next one.
A. That is all in the name of Moeller.
Q. Isn't there one 1-4-35, 8.75 acres?
A. I have four more items. We started on page 892.
Q. Take the first one on page 890.
[fol. 128] A. Henry Moeller, Archbishop, described 1-4-35, north half, on the duplicate 152.95 acres. Assessment is against 7,007.54 feet. The assessment is $2,162.37, interest $1,297.42, total $3,459.79.
Q. Now take the first one on page 891.
A. That is for 9.21 acres. Described 1-4-35, south half, Lot No. 1, Levi White, 9.21 acres on the tax duplicate. Assessment $49.54, interest $29.72, total $79.26.
Q. Take the next one on page 891.
A. 1-4-35, south part is the description, Lot No. 2, Levi White, known on the tax duplicate as ten acres and the feet on there is 424.34. Assessment $136.39, interest $81.83, total $218.22.
Q. The next one.

A. Described as 1-4-35, south part of Lot No. 3 in Levi White, known on the duplicate as 8.75 acres, and the feet assessed is 283.72 feet. Assessment $95.92, interest $57.55, total $153.47. That is all in the name of Archbishop Moeller.

Q. In the assessment against Ella White, page 903.

A. Ella White, is described as 1-4-35, south half 7.20 acres on the tax duplicate. Assessment $105.39, interest $63.23, total $168.62.

Q. Now against Henry and Emma Trautman, page 885.

A. That is described as 1-4-35, Lot No. 6, in White's estate, on the duplicate 7.32 acres, feet assessed 356.40. Assessment is $121.31, interest $72.79, total $194.10.

Q. Please find the assessment against Amelia A. Gregory.

[fol. 129] A. Is it in Sycamore Township?

Q. Yes.

A. Amelia E. Gregory, 1-4-35, south half is the description, two and one-half acres; that is on the tax duplicate. That does not mean the assessment is for all the feet.

By the Court: Read what is there.

A. Assessment $21.19, interest $12.71, total $33.90.

Q. I will ask you to state to the court whether Book O shows how much is assessed for frontage, how much for acreage and how much for valuation?

A. It does not.

Q. You mentioned the front feet in certain cases.

A. Yes; the idea of that is to help identify it.

Q. Does the certificate from the County Commissioners show those facts?

A. I think it does.

Q. Take up Henry Moeller. Take up the 7.68 acres in Archbishop Moeller. Give that part of the assessment which is frontage, if any.

(Objected to by counsel for defendant. Objection sustained.)

By the Court: The whole assessment roll may go into evidence. If you want to identify the assessment roll and have the witness read from any portion I will pass on those as read.

By Mr. Matthews:

Q. Please state what this document is here.

A. That is a certificate of the assessment for Section X, Intercounty Highway 46, Glendale and Milford, certified to the County [fol. 130] Auditor by the County Commissioners. That is the way I understand it to be.

Q. Where does this document come from this morning?

A. From the County Auditor's office. I have it in my charge down there.

By the Court:

Q. It is part of the records of the County Auditor?

A. Yes.

By the Court: It may be offered in evidence wtih the privilege of reading from it such parts as you wish to read.

By Mr. Matthews: I so offer it, if your Honor please.

Q. Take up the item I first mentioned, Henry Moeller, Archbishop, 1-4-35, 7.68 acres, total assessment $8.13.

(Objected to by counsel for defendant. Objection overruled for for future ruling of the court and counsel for defendant excepted.)

Q. Please read that item across the page, indicating the meaning of the entries under the headings.

A. Moeller, Henry, Archbishop. Next heading Range, Town, Section 1-4-35, Lot No. 3, division—Levi White, west of canal. In that particular case no front feet shown. Next shown total cost per foot nothing, and acres 7.68, total cost $26.22; total value land and building $860.00.

[fol. 131] By the Court: Just go across your page. Read first the heading and then item.

By Mr. Matthews:

Q. The total assessment on the one asked about as given from Book O is $8.13?

A. Well, that is known as 1-4-35, south part 2, Levi White, $4.30, $50.00.

Q. Under what headings are those?

A. $4.30 is the total cost acres. Next total value of land and buildings $50.00; total cost for land and buildings value 78 cents, total cost for front foot acres, land, building, etc., $5.08, interest $3.05. The total of the two items $8.13.

Q. Take the next item .18 of an acre.

A. Proprietor, Moeller, Henry, Archbishop. Description—Range, Town and Section. Range 1, Town 4, Section 35, southeast quarter, number of Lot No. 2, Levi White, all west of canal that is in the division, .18 acre, total cost acre 59 cents, total value land and buildings $10.00, total cost for land and building value 16 cents, total cost per front foot, acres, etc., 75 cents, interest 45 cents, total $1.20.

Q. Now take the 7.55 acres.

A. Proprietor, Moeller, Henry, Archbishop. Range 1, Town 4, Section 35, south quarter, Lot No. 4 Levi White, west of canal, 7.55 acres. Total cost acres $25.81, total value land and buildings $840.00, total cost for land and building $13.10, total cost for front foot, acres, land and building $38.91, interest $23.35, total $62.26.

Q. Take the item 152.95 acres.

[fol. 132] A. Proprietor, Moeller, Henry, Archbishop. Range 1, Town 4, Section 34, north half quarter on Reading Street, front foot nothing, in the division front foot shown 7,007.54, total cost front feet $1,360.28, acres $152.95, total cost acres $503.87, total value land and buildings $19,100.00, total cost for land and build-

ing value $298.22, total cost for front foot, acres, land and building value $2,162.37 and the next is $1,297.42.

Q. The total is not given on that sheet, the total with the interest?

A. No, it is not here.

Q. Take the item of 7.67 acres.

A. In the name of Henry Moeller?

Q. Yes.

A. What is the total $62.84?

Q. No, there is another one. The total assessment on this is $39.65 without interest.

A. Proprietor, Moeller, Henry, Archbishop. Range 1, Town 4, Section 35, south quarter Lot No. 3, Levi White's, west of canal, 7.68 acres. Total cost acres $26.22, total value land and building $860.00, total cost for land and building value $1,343.00, total cost for front foot, acres, land and building $39.65, and the interest is $23.79.

Q. The next item is 6.14 acres.

A. Proprietor, Moeller, Henry, Archbishop. Range 1, Town 4, Section 35, south half quarter, Lot No. 1, Levi White, west of canal, 6.14 acres, total cost $20.99, total value $1,500.00 Total cost for land and building $23.42, total cost front foot, acres, etc., $44.41, interest $26.65.

[fol. 133] Q. Is there a separate frontage assessment given there on that one?

A. No, sir; acres only, no feet.

Q. The next item 8.75 acres.

A. Proprietor, Moeller, Henry, Archbishop. Range 1, Town 4, Section 35, south part of quarter, Lot No. 3, Levi White, east of canal. Front foot 283.72, total cost front feet $55.07, acreage 8.75, total cost on the acreage $28.83, total value land and building $770.00, total cost land and building $12.02, total cost for front foot $95.92, interest $57.55.

Q. Now the next item ten acres, the total assessment on which is $136.39.

A. Proprietor, Moeller, Henry, Archbishop. Range 1, Town 4, Section 35, south part, Lot No. 2, Levi White, east of canal, front foot assessment $424.34. Total cost front foot $82.37, ten acres, total cost for acreage $32.94, total value land and building $1,350.00, total cost land and building $21.08, total cost for front foot, acres, etc., $136.39, interest $81.83.

Q. Another item ten acres on which the total assessment besides interest is $134.86.

A. Proprietor, Moeller, Henry, Archbishop. Range 1, Town 4, Section 35, south quarter, Lot No. 4, Levi White, each of canal. Front foot 416.46. Total cost front foot $80.84, ten acres. Total cost acres $32.94, total value land and building $1,350.00, total cost land and building $21.08, total cost front foot, $134.86, interest $80.92.

Q. Another item ten acres on which the total assessment outside of the interest is $121.26.

[fol. 134] A. Proprietor, Moeller, Henry, Archbishop. Range 1,

Town 4, Section 35, south half quarter, Lot No. 7, Levi White, east of canal, front foot 321.50, total cost front foot $67.24, ten acres, total cost acres $32.94, total value land and building $1,350.00, total cost land and building $21.08 and total cost for front foot, acres, etc., $121.26, interest $72.76.

Q. Now item 9.21 acres, total assessment outside of interest $49.54.

A. Proprietor, Moeller, Henry, Archbishop. Range 1, Town 4, Section 35, south half quarter, Lot No. 1, Levi White, east of canal, acres 9.21, total cost acres $3,034, total value land and building $1,230.00, total cost for land and building $19.20, total cost for front foot, acres, etc., $49.54, interest $29.72.

Q. Take item 7.43 acres, total assessment on which is $84.16 without interest.

A. Proprietor, Moeller, Henry, Archbishop, 1-4-35, south quarter, Lot No. 5, Levi White, west of canal, front foot 239.94, total cost front feet $46.58, acres 7.43, total cost acres $24.48, total value land and building $840.00, total cost for land and building $13.10, total cost front foot, acres, etc., $84.16, interest $50.50.

Q. Take item 7.20 acres in the name of Ella White.

A. Ella didn't own it at the time it was built. I will have to look around and see who she got it from.

(Objected to by counsel for defendant. Objection sustained.)

[fol. 135] Q. Give it if you found it.

A. Proprietor, White, Ella, Range 1, Town 4, Section 35, south half quarter, Lot No. 7, on Clark Street, west of canal. Feet front foot 356.40, total cost front foot $69.18, acres 7.20, total cost acres $23.72, total value land and building $800.00, total cost for land and building $12.49, total cost for front foot $105.39, interest $63.23.

Q. When you read that top total cost front foot, acres and building value.

A. Acres land and building value.

Q. You didn't say the whole thing in the column.

A. Didn't I, I intended to. Total cost front foot, acres, land and building value.

Q. Take Henry and Emma Trautman.

A. What page is that on?

Q. Page 885 of Book O.

A. At the time the assessment was made Henry and Emma Trautman did not own the property. Therefore, that name will not appear on here.

Q. Identify the piece of property 7.32 acres.

A. It is in the name of Christian A. Jentz.

Q. Read that please.

A. Jentz owned it then and since transferred it to Trautmans.

Q. Read that.

A. Proprietor, Jentz, Christian A., Range 1, Town 4, Section 35, Lot No. 6 on Clark Street, Levi White, west of canal, subdivision front foot 356.40, total cost front foot $74.54, acres 7.32, total cost acres $24.12, total value land and building $1,450.00, total cost for

land and building value $22.65, total cost for front foot, acres, land [fol. 136] and building value $121.31 and the interest is $72.79.

Q. Assessment on Amelia A. Gregory.

A. Proprietor, Gregory, Amelia A., Range 1, Town 4, Section 35, south half quarter on east side of Canal Street, acreage 2.50, total cost acres $8.54, total value land and building $810.00, total cost for land and building value $12.65, total cost for front foot, acres, land and building value $21.19, interest $12.71.

Q. Please turn to the assessment on Mortimer Matthews and read them.

By Mr. Durr: From this point on I do not care to make any objection to the questions or any motions to strike out the answers.

By Mr. Matthews: They are all together I believe.

A. Proprietor, Matthews, Mortimer, Range 1. Town 4, Section 35, south half, they are all on Matthews Street, 59.78 acres, total cost acres $196.94, value $6,830.00, total cost land and building value $106.64, total cost for front foot, acres, land and building values $303.58, interest $182.15.

Q. The next one.

A. Mortimer Matthews, Range 1, Town 4, Section 35, north half quarter, 7.10 acres. Total cost acres $23.39, total value land and building $8,080.00, total cost for land and building value $126.16, total cost for front foot, acres, land and building values $149.55, interest $89.73.

[fol. 137] Q. How does that item appear on Book O; in whose name is it? It is on page 889.

A. Marianna Matthews.

Q. Now read the third one.

A. Matthews, Mortimer, Range 1, Town 4, Section 35, north half quarter on Matthews Street, 44.07 acres. Total cost for acres $145.18, total value land and building $10,080.00, total cost for land and building values $157.38, total cost for front foot, acres, land and building $302.56, interest $181.53. Next Matthews, Mortimer, Range 1, Town 4, Section 35, southwest quarter, 9.76 acres. Total cost per acre $32.15, total value land and building $890.00, total cost for land and building value $13.98, total cost for front foot, acres, land and building $46.13, interest $27.68.

Q. The next one.

A. Proprietor, Matthews, Mortimer, Range 1, Town 4, Section 35, southwest quarter, 5.96 acres. Total cost acres $19.63, total value land and building $660.00, total cost for land and building value $10.30, total cost for front foot, acres, land and building $29.93, interest $17.96.

Q. Next one.

A. Range 1, Town 4, Section 35, southwest quarter, .45 of an acre. Total cost acres $1.48, total value land and building $50.00, total cost for land and building value 78 cents, total cost for front foot, acre, land and building value $2.26, interest $1.36.

Q. Does that state what tract that is of?

A. Yes, off the 9.77 acre on the tax duplicate.

[fol. 138] Q. How does it appear on Book O of the assessments?

A. .45 acres is on the assessment book.

Q. Does it show what tract it is off?

A. It does not state any more on here.

By Mr. Matthews: If your Honor please, on the tax bill as rendered to me for that particular piece it was said to be a part of a 40 acre tract. It is on the 9.77 acre tract and if the other assessments are good this one is on that little piece.

Q. Will you kindly give the court the totals, the grand totals at the end of all that assessment roll under the proper headings?

(Objected to by counsel for defendant. Objection overruled subject to future ruling of the court and counsel for defendant excepted.)

Q. You don't care for the total front foot?

A. I just want the grand total of all that line.

By Mr. Durr: If the court please, the question was the total assessments on all the property. I suggest the witness be permitted to answer that question or the question be withdrawn.

(Motion sustained.)

By the Court: Witness now reading from the assessment roll. You can ask him to read any part of the assessment roll you want.

[fol. 139] By Mr. Matthews:

Q. I will ask him to read the grand totals at the end of the assessment roll.

A. Under the heading "Front foot" is $26,800.20.

(Objected to by counsel for defendant. Objection overruled.)

A. Total cost front foot $5,202.38, acres 1,579.18, total cost acres $5,202.38, total value land and buildings $332,300.00, total cost for land and building values $5,202.39, total cost for front foot, acreage, land and building value $15,607.15, total interest $9,364.47.

Q. Please read this summary of the assessment of the total cost and distribution of the cost as it appears at the front of this assessment roll.

A. May 20, 1920, Glendale and Milford Section X, total cost $162,200.00, bridge and culverts $61,028.50, making a total of $156,071.50. Now we have here under heading "Total cost" $162,200.00, ten per cent assessment is deducted which leaves $146,592.85. The states' share is $43,400.00, which leaves the county's share $103,192.85.

(Counsel for defendant moved to strike out the answer. Mr. Matthews is attempting to establish the cost of the improvement by notation contained on the assessment roll. He is using a wrong procedure.)

By the Court: It is subject to future ruling.

(Counsel for defendant excepted to the ruling of the court.)

[fol. 139a] By the Court: Let the record show that the statements just read by the witness were read from a lead pencil memorandum on the inside of the cover of the assessment roll.

By Mr. Matthews:

Q. In the early part of your testimony in giving some of the assessments on Archbishop Moeller, towards the end of each item asked about in reading the headings at the top of the page you said, total cost per front foot so much, and afterwards when your attention was directed to it in regard to other items you read the full title of that column as, total cost per front foot, acres, land and building value so much. I would like to have you state whether the proper reading of that heading isn't as I have last given it?

A. I did. Total cost for front foot, acres, land and building value.

(Counsel for defendant objected to the question and moved to rule out the answer. Objection and motion overruled subject to later ruling of the court, and counsel for defendant excepted.)

By Mr. Matthews: Now, if your Honor please, on looking this over carefully, I desire to have the whole thing in evidence, so I wish leave to file as soon as I can get it with your Honor a certified copy of this document.

By the Court: That will go in subject to the defendant's objection.

[fol. 139b] By Mr. Durr: Yes.

(Marked plaintiff's Exhibit 8. Attached hereto and made a part hereof.)

By the Court: Let the record show the original may be withdrawn and a certified copy substituted for the original.

Cross-examination.

By Mr. Durr:

Q. You did not prepare the assessment roll, did you?

A. No, sir.

Q. Do you remember when you first received it?

A. 9-8-20. September 8, 1920.

Q. What did you do with it after you received it?

A. Figured the interest on it at six per cent. and placed it here in lead pencil. Those are my figures. Then I copied it into this book.

Q. What did you copy in that book?

A. The total assessment.

By Mr. Matthews:

Q. You mean Book O?

A. Yes, sir, copied it in alphabetical order as near as possible and divided it in twenty instalments after I computed the interest.

By Mr. Durr:

Q. What part of the assessment roll did you enter into Book O, the assessment book?

[fol. 140] A. The description of the property, and the total cost and the interest.

Q. When you say total cost what do you mean?

A. As I find it in this column, total cost for front foot, acreage, land and building.

Q. Did you pay attention to the other columns, Mr. Meinhardt?

A. No, I did not.

Q. Book O is what book?

A. It is an assessment book and we used it to designate on our tax duplicate whether the assessment can be found. We use the assessment book to divide it into semi-annual instalments. Sometimes the assessment only touches part of a tract of ground and our duplicate shows a larger or smaller tract, larger in most cases. I place it on there to help the clerks locate the property to place the assessment thereon.

Q. Does your office keep a separate duplicate for road assessments?

A. No, no separate duplicate.

Q. What is Book O?

A. An assessment book.

Q. Isn't that a duplicate?

A. Well, I don't know if you can call that a duplicate; it is only made single.

Q. Is Book O a part of your permanent records or not?

A. Yes, I would say so.

Q. Would you say the assessment roll was part of your permanent record?

(Objected to by counsel for plaintiff.)

[fol. 141] Q. Is the assessment roll part of your permanent record?

(Objected to by counsel for plaintiff. Objection sustained and counsel for defendant excepted.)

By the Court:

Q. The answer is it or is it not. What is it?

A. I say it is. We think so much of it we don't want to let it get away.

By Mr. Durr:

Q. What do you use it for?
A. For reference. We consider it the original assessment. It comes to our office from the County Commissioners.
Q. Why is it neecssary to have two references?
A. This is the real thing I think.
Q. As a matter of fact isn't this the procedure: You receive from the County Commissioners a list containing the names of the people whose property is assessed, a description of the property and the sum and total of the assessment?
A. Yes, sir.
Q. Don't you place that list upon your duplicate?
A. Yes, sir.
Q. And charge the property with the amount that the property is assessed?
A. Yes, sir.
Q. Isn't that correct?
A. Yes, sir.

[fol. 142] MORTIMER MATTHEWS, being first duly sworn, testified in his own behalf as follows:

Direct examination:

My name is Mortimer Matthews. I am the plaintiff in the case No. 177016, Mortimer Matthews against Louis Huwe, as Treasurer of Hamilton County on trial. I am a citizen and resident of Hamilton County and have been since the year 1858. I am the owner in fee simple of certain tracts of land in Sycamore Township in Hamilton County, in the State of Ohio, and entered upon the tax duplicate of said county as described in the petition.

By Mr. Durr: I suggest you might conform to the rules and procedure of asking questions and giving answers.
By the Court: I prefer after the mere formal parts to ask the questions and let me rule on them.
By the Witness: The tracts of land that I have just spoken of are as follows: Tract of land containing ten acres in the southwest quarter of Section 35, Township 4, Range 1, and others described in the petition here. These tracts of land are described in the tax bill which I obtained from Louis J. Huwe, Treasurer, in December, 1920. This bill is No. 1250 and may be marked as plaintiff's Exhibit 7.

(Objected to by counsel for defendant.)

By the Court: The record of the County Commissioners you have there will show the assessment on this property.

[fol. 143] (Objection sutained.)

(Marked for identification, Plaintiff's Exhibit 7, refused.)

By the Witness:

Q. My question is, when did you first know of the assessment on your property for the Glendale and Milford Road?

A. My answer to that is, I did not know of any improvement of the Glendale and Milford Road project or any assessment on my property on account of it until I received this tax bill from the Treasurer, the County Treasurer, Louis J. Huwe, in December, 1920.

Q. When did you first know of the name of Glendale and Milford Road, Section X, being applied to this road upon which this assessment was made?

A. My answer to that question is, that I never knew it until I received this tax bill. The tax bill itself uses only the initials G. & M. Road and I did not know what that meant until I came to the courthouse and made an examination and then found there was an assessment on the Glendale and Milford Road and that was in December, 1920.

Q. I ask the witness to make a comparison of distances from his property and the property of Marianna Matthews on Oak Avenue between the Dixie Highway or the Carthage Road or Hamilton Road on the west and the Reading Road on the east.

A. My answer to that is, of course, my property being nearly one mile in length the distances from different parts of it vary just that [fol. 144] much, but the distance from Marianna Matthews' property to the Dixie Highway at Glendale is fully a mile shorter by using Oak Avenue than by using the connecting road, the Martin and the Glendale and Milford Road. The distance from her property by Oak Avenue to the Reading Road is in the neighborhood of half a mile shorter to the point where the Glendale and Milford Road intersects the Reading Road, than it would be by the use of the Lockland Road and the Glendale and Milford Road to the Reading Road.

Q. I ask the witness to state how his farm buildings on his 87.59 acre tract as marked on Exhibit 1 lie with reference to distances from the Glendale and Milford Road.

By Mr. Durr: This is a general objection.

(Objection overruled subject to further ruling of the court. Defendant excepted.)

By the Witness:

A. In answer to that question I say that my cow barn, dairy house and silos, forming one cluster of buildings, and my farm boarding house or dwelling house in which most of my farmhands live or some of them, and the poultry house, as marked on Exhibit 1, are north of the half-mile line, the line being one-half mile in a direct line from the Glendale and Milford Road, and that my calf barn and horse barn and superintendent's house, and a small garage near the horse barn, not marked on Exhibit 1, are south of this half-mile line, the half-[fol. 145] mile line being represented by the dotted line on Exhibit 1. The only ones of these buildings that I did not build myself are what I have called the farm boarding house and the horse barn.

They were old buildings on the farm when I bought it in 1902. I have made certain repairs from time to time on all of those buildings. The dairy house, cow barn and silos I built myself; also the poultry house and the calf barn and the superintendent's house. These buildings were all built some time between 1905 and 1910, 1911 or 1912, along there. Of course, I remember in a general way what I paid for building these buildings. I built other buildings. I built the residence on my wife's property and all the improvements there and know what they cost in a general way; that is, I recollect what they cost in a general way. I know the value of the various farm buildings.

Q. Now, the witness may state what the relative value of the farm buildings north of the dotted line or half-mile line on Exhibit 1 is with reference to the buildings south of that line.

By Mr. Durr: We have been objecting right along to all reference involving property not south of that dotted line on your plat.

By the Court: It may go in subject to future ruling.

(Counsel for defendant excepted.)

By the Witness:

A. My answer is, that the value of the buildings north of that line is at least three times as much as the value of the buildings south of the line.

[fol. 146] Q. The witness is asked whether any of the property of the plaintiff abuts on the Glendale and Milford Road, Section X?

A. The answer is that none of it does; that this piece marked on Exhibit 1, 59.97 acres, also does not abut on the Lockland Road, but between it and the Lockland Road is the Miami and Erie Canal. Oak Avenue on which palintiff's property is situated is approximately parallel with the Glendale and Milford Road, Section X, throughout its entire length. It is represented on this plat which is entitled "Road Map of Hamilton County, Ohio," and printed at another place, "Compliments of E. A. Gast, County Surveyor," as under the name of Oak Avenue and runs from the Carthage and Hamilton I. C. H. 43 all the way over to the Cincinnati-Dayton I. C. H. 19.

By Mr. Matthews: I offer this in evidence, this plat.

By Mr. Durr: We have no objection.

(Marked Plaintiff's Exhibit No. 10. Attached hereto and made a part hereof.)

By the Witness: I also produce a blueprint of a plat which I obtained in the County Surveyor's office showing that portion of Oak Avenue and that portion of the Glendale and Milford Intercounty Highway, Section X, which extends from the section line, between the two section lines. I don't know these sections. It includes the entire property of Mortimer and Marianna Matthews and part of the [fol. 147] property of Henry Moeller, Archbishop, and other properties.

By Mr. Matthews: I offer this in evidence.
By Mr. Durr: No objection.

(Marked Plaintiff's Exhibit No. 10. Attached hereto and made a part hereof.)

By the Witness: I wish to say about this plat that it corresponds with plat first put in, Exhibit 1, in its general aspects, except that it does not show the newly made curve in the Glendale and Milford Intercounty Highway, Section X, which was shown on the other plat, Exhibit 1.

Cross-examination.

By Mr. Durr:

Q. Mr. Matthews, how long have you lived on your farm near the Glendale and Milford Road?
A. I have lived there, in that locality, since the summer of 1886. I did not own the farm until 1902.
Q. You live on the farm known as the Marianna Matthews farm?
A. It is not a farm, Mr. Durr, it is a residence. The property is in her name. It is nine acres. I first bought nine acres from Otto Heinememan and lived there until 1902 and after his death his farm in which these nine acres was almost in the middle came into the market and I bought the whole farm, about 200 acres or more.
fol. 148] Q. How long have you been a practicing lawyer, Mr. Matthews?
A. Since the summer of 1881.
Q. During the last three years have you had occasion to come to the courthouse?
A. Yes, sir.
Q. And about how often did you come to the courthouse during that period?
A. Not as often as I have at times. When I first was in the practice I used to be in the courthouse every day, but not so much now within the last few years.
Q. How many times have you appeared before the Board of County Commissioners, Mr. Matthews, approximately?
A. Well, two or three times in my life.
Q. Were those times within the last three years?
A. No.
Q. Have you been there at all within the last three years?
A. Not to make any application to them. After the pendency of these two suits I saw that the County Commissioners were, and it was about this time last year, were going to have a meeting in regard to the improvement of the Reading Road north of Sharon; I think it was that part. Well, it would not be called Reading Road up there, the Dayton Pike and those places up there, and I attended that meeting, but I did not take any part, just listened to the proceedings.
Q. Have you ever communicated with the County Commissioners in reference to the repair or construction of roads?

[fol. 149] A. Oh, I think I have; yes. I think I once made application for some repairs or improvements on this road on which I live.

Q. That road is named what?

A. I never knew the name of the road itself. For instance, my policies, that is until recently, until the name has been up, Oak Road, my fire policies on my wife's property and on my farm property described it as being on the Matthews Road. I do not know any better name for it than that.

Q. Had you any knowledge prior to the 13th day of April, 1920, that Intercounty Highway No. 46, the Glendale and Milford Road, was the same as Oak Avenue or that part of it was known as Oak Avenue?

A. I don't think I did.

Q. You then had no knowledge of a change in the direction of the Cincinnati and Milford Road, the change in the direction of that road from Oak Avenue to its present location?

A. No, I never knew that the road I lived on was the Glendale and Milford Road.

Q. You had no knowledge of an application having been made to the State Highway Department to change the direction of the Glendale and Milford Road from its direction at that time passed your property to its present location?

A. I will tell you what my knowledge consisted of. I knew in a general way that the State Highway Department was going to make an Intercounty Highway of what is called the Glendale and Milford Road, Section X, and east from there.

[fol. 150] Q. Don't you know, Mr. Matthews, as a matter of fact that the State Highway Department does not make Intercounty Highways?

A. That is a question of law and depends upon the construction of the statutes. Yes, I think it does.

Q. A statute that is obvious needs no construction.

A. They accept certain roads as Intercounty Highways.

Q. You have had no knowledge that this change in the Intercounty Highway No. 46 or the Glendale and Milford Road so called took place prior to the year 1920. Do I understand your testimony to be that?

A. Yes. I knew it as we always have in the neighborhood, that the White Road or Skillman Road had been made an Intercounty Highway. I knew that in some form.

Q. You didn't know it had become an Intercounty Highway from the fact the Intercounty Highway had been changed from Oak Avenue to Skillman Avenue?

A. No, I did not know that.

Q. You receive the daily papers at your residence, do you not?

A. Oh, yes.

Q. Did you know whether or not an application for state aid on the Glendale and Milford Road I. C. H. 46, Section X, was made by the Commissioners of Hamilton County on April 13, 1920?

A. I did not know it at the time or months afterwards.

Q. How long afterwards?

[fol. 151] A. About the 1st of December, 1920, I knew it. The County Treasurer mailed me, as he does to most everybody, my tax bills, and then I knew for the first time about this assessment. It was about December 1, 1920.

Q. Did you know May 11, 1920, the Board of County Commissioners of Hamilton County passed and adopted a certain resolution declaring it necessary to improve the Glendale and Milford Road, Section X, and provided a method of assessment?

A. No, not until after I received the tax bills about December 1st and then I came and looked up the record in the County Commissioners' office.

Q. Did you know January 1, 1920, the plans for the improvement were submitted to the State Highway Department?

A. No.

Q. Did you know January 23, 1920, altered plans were submitted to the State Highway Department?

A. No.

Q. Did you know on September 14, 1920, the plans were approved by the State Highway Department and returned to the Board of County Commissioners of this county?

A. No, I did not know it. I don't know it now either.

Q. I will ask you whether you knew the final resolution and estimate was received by the Board of County Commissioners from the State Highway Department on May 4, 1920?

A. No, I did not know it.

[fol. 152] Q. Did you know that the County Commissioners of Hamilton County passed a resolution on May 11, 1920, fixing a date for public hearing for objections and claims against this improvement?

A. No, I did not know that until after December 1, 1920.

Q. Did you know on the 28th day of May, 1920, a public hearing was held in the office of the Board of County Commissioners of this county for the purpose of hearing objections to this improvement and for considering any claims for damages that might be filed in accordance with their invitation?

A. No, I did not know that until after December 1, 1920.

Q. Did you know between the dates of May 11, 1920, and May 28, 1920, a notice was published in two newspapers of opposite politics in this county inviting all persons interested that a public hearing would be held May 28, 1920, for the purpose of hearing objections and claims?

A. I did not know that until after December 1, 1920.

Q. Did you know on the 28th day of May, 1920, the County Commissioners of this county passed a resolution instructing the County Surveyor to prepare and submit an estimate assessment roll?

A. I did not know it until after December 1, 1920.

Q. Did you know on the 22nd day of June, 1920, the Surveyor of Hamilton County presented to the Commissioners an estimated assessment roll?

A. I did not know it until after December 1, 1920. In fact I [fol. 153] did not know, to make a long story short, I did not know anything connected with this assessment until after 1920.

(Counsel for defendant moved to strike out the last part of the witness' statement.)

By Mr. Matthews: I will withdraw it.

By Mr. Durr:

Q. Did you know on the 22 day of June, 1920, the Commissioners of Hamilton County passed a resolution fixing a certain date for hearing objections or complaints on the estimated assessment roll as filed by the Surveyor?

A. I did not know it until after December 1, 1920.

Q. Did you know there was published in the Cincinnati Commercial Tribune on June 24 and July 1, 1920, a notice to all persons whose property was within the one-half mile assessment area of the Glendale and Milford Road, Section X, that a meeting would be held in the Board of County Commissioners' office July 9, 1920, for the purpose of hearing objections and complaints on the same on the tentative assessment roll then on file in the County Commissioners' office?

A. No, sir; I did not know it until after December 1, 1920.

Q. Did you know on July 9, 1920, there was a hearing held for the purpose of considering complaints to the assessments?

A. I did not know that; no, and I do not know now whether there was a hearing in the sense that anybody was there.

[fol. 154] Further hearing adjourned until 10 A. M. Thursday, February 23, 1922.

Morning Session,
Thursday, February 23, 1922—10 A. M.

MORTIMER MATTHEWS recalled for further cross-examination:

By Mr. Matthews: If your Honor please, I would like to put in two questions in chief before proceeding further with my cross-examination.

Q. The question is, do you know at what time the actual work on Section X of Intercounty Highway 46 was begun with reference to a beginning of these cases?

A. The petitions in these cases were filed on January 17, 1921, and a preliminary injunction was issued the same day. The actual work on the ground of this highway did not begin until the following spring. That I know from my knowledge.

Q. The question is, do you know of any building going on, on the property of Archbishop Moeller at the present time?

(Objected to by counsel for defendant. Objection sustained and counsel for plaintiff excepted and offered to prove—my answer to that is, I do.)

Q. What building is this, of what property along this road and how extensive?

(Objected to by counsel for defendant. Objection sustained and counsel for plaintiff excepted and offered to prove that last summer [fol. 155] or fall extensive building began on the property of Archbishop Moeller abutting on the Glendale and Milford Intercounty Highway. That this building is situated in the property in the curve as shown on the Stewart plat, Exhibit 1, partly on the line of the old roadway which was changed by this curve and partly on the old roadway itself and partly in the land which was thrown from the south to the north side of the road by making the curve. That this building is of a very extensive character, the foundations seem to be there finished at this time and were before winter set in and are of a large institutional building. The property is occupied by St. Rita's Home for the Deaf and Dumb.)

By Mr. Durr:

Q. Mr. Matthews, did you know or do you know now that on the 9th day of July, 1920, the Board of County Commissioners approved the assessments against property within one-half mile of the Glendale and Milford Road, Section X, and certified them to the County Auditor?

A. I think I know that now by their records.

Q. Did you know it at that time?

A. No.

Q. Did you know on July 9, 1920, the Board of County Commissioners of Hamilton County passed a resolution levying a tax and determined to issue bonds in anticipation of the collection of the taxes then levied and in anticipation of the collection of assessments [fol. 156] levied against property within one-half mile of the Glendale and Milford Road, Section X?

A. I did not know it at that time and until after December 1st following.

Q. Did you know on July 16, 1920, the Board of County Commissioners offered those bonds to the Industrial Commission of the State of Ohio?

A. I did not know it at that time.

Q. Did you know on July 23, 1920, the Industrial Commission rejected the bonds?

A. I did not know that at the time.

Q. Did you know on July 9, 1920, the bonds were offered to the Sinking Fund of the County of Hamilton?

A. I did not.

Q. Did you know on the 16th day of July, 1920, the Sinking Fund Trustees rejected the bonds?

A. I did not.

Q. Did you know on August 2, 1920, the Board of County Commissioners determined to advertise for the sale of the bonds?

A. I did not know it at that time.

Q. Did you know on August 27, 1920, the County Commissioners received bids for the purchase of the bonds issued in anticipation of the collection of assessments and in anticipation of the collection of taxes?

A. I did not know it at that time.

Q. Did you know on September 10, 1920, the County Commissioners adopted and passed the final resolution for the improvement of the Glendale and Milford Road, Section X?

[fol. 157] A. I did not know it at that time, not until after the 1st of December.

Q. Did you know on December 12, 1920, bids were opened for the construction of Section X of the Glendale and Milford Road by the County Commissioners?

A. I did not know it at that time.

Q. Did you know on November 23, 1920, that the contract was awarded to the lowest and best bidder for the construction of Section X of the Glendale and Milford Road?

A. I did not know it at that time.

Q. Mr. Matthews, do you know the taxable valuation placed upon your property known as Mortimer Matthews' property, the 87.59 acres, as to lands?

A. On the whole tract?

Q. Yes.

A. It is in the neighborhood——

Q. I asked you if you knew what it was?

A. I think I know approximately, not within a cent.

Q. You can not tell us definitely?

A. It is in the neighborhood of $20,000.00 on that tract; that is, on the tract and buildings together.

Q. Directing your attention to the dotted line which represents the northern boundary of the assessing area, the area which was assessed, I will ask you how much of the 87.59 acre tract approximately lies south of that dotted line?

A. I am assessed in the neighborhood of 44 acres and I am not questioning that. I think there may be an inaccuracy.

Q. Confine yourself to my question.

[fol. 158] A. I thought I did that.

(Question read by the stenographer.)

"Q. Directing your attention to the dotted line which represents the northern boundary of the assessing area, the area which was assessed, I will ask you how much of the 87.59 acre tract approximately lies south of that dotted line?"

A. About 44 acres; a little over one-half.

Q. How many buildings are located on that part of the 87.59 acre tract south of the dotted line?

A. Beginning at the south, first comes the superintendent's cottage, next is the horse barn, next north is the calf barn, which we call the calf barn. Immediately south of the horse barn there is a little

garage, a kind of shed there that houses a Ford machine, and that is all that is south of that line of that half-mile line.

Q. There are no chicken coops in that area?

A. Yes, between the superintendent's cottage and the cow barn and dairy house there is a line of three or four, I think probably four chicken coops. They are portable sheds; they are not set on foundations.

Q. Is there a garage in that tract?

A. Yes. I said just south of the horse barn there is a garage just big enough to hold one machine.

Q. Do you carry any insurance on the buildings located south of the dotted line?

A. Yes, sir.

Q. How much insurance do you carry on the two-story dwelling?

[fol. 159] A. I could not say without referring to my policies.

Q. How much insurance do you carry on the calf barn?

A. I could not say without referring to the policies. I have no idea; that is, I have no recollection.

Q. Can you tell whether or not the insurance is in excess or less than the taxable valuation?

A. I think it is in excess.

Q. How much is it in excess?

A. That I could not say. I think my buildings on that tract are insured for more than $10,000.00, which is the amount approximately. They are assessed at $9,250.00. I am very sure I carry more insurance than that on them.

Q. You are speaking now of the property south of the dotted line, are you not?

A. No, I am speaking of the whole on the 87-acre tract. I am confident I carry more insurance than the taxable value on those south of the line.

Q. You are familiar with the Marianna Matthews property?

A. Of course. That is where I live; that is my residence.

Q. How many buildings are on that property south of the dotted line?

A. Well, there is the residence as marked here on this Stewart plat, Exhibit 1, situated about where it is marked on that plat and there is the conservatory to the right and slanting away from the house—something was said here yesterday about some—I guess they are not represented here. There are some outhouses the back part [fol. 160] of that house. Shown on Mr. Stewart's plat is a kind of woodshed at the back; there is back of that a dog kennel.

Q. How much insurance is carried on the residence on that tract, if you know?

A. I do not know. I don't recollect.

Q. How much is carried on the conservatory?

A. I don't recollect.

By Mr. Matthews: If your Honor please, I offer in evidence a certified copy of the proceedings before the County Commissioners

of this assessment, except the lower half of page 51 and page 52; whatever appears on page 52, which concerns another assessment. You will agree to that?

By Mr. Durr: Yes.

(Marked Plaintiff's Exhibit 11. Attached hereto and made a part hereof.)

Thereupon the plaintiff rested his case.

By Mr. Durr: Counsel for defendant at this time desires to demur to the evidence.

(Overruled, subject to future ruling of the court, and counsel for defendant excepted.)

Thereupon the defendant, to maintain the issues on his part, called as a witness.

EDWARD KUHN, called on behalf of the defendant, being first duly sworn, testified as follows:

[fol. 161] Direct examination.

By Mr. Durr:

Q. Where are you employed?

A. Real estate auditor, County Auditor's office.

Q. What is your position there?

A. Well, I am deputy in the Real Estate Department of the County Auidtor's office.

Q. Are you a Deputy County Auditor?

A. Yes, sir.

Q. As such Deputy County Auditor what control have you over the custody of the tax duplicates of the county?

A. Well, changing values and reappraising values, new buildings, additions, etc., corrections.

Q. Are the tax duplicates of this county in your custody?

A. Not directly, no. As I say, make corrections, additions, etc.

Q. Now, have you with you today the tax duplicate of the county showing the valuation of property owned by Mortimer Matthews and Marianna Matthews?

A. Yes, sir.

Q. Where is that?

By the Court:

Q. Springfield Township?

A. No, Sycamore Township.

By Mr. Durr:

Q. What township?

A. Sycamore Township.

[fol. 162] Q. Directing your attention to page 106 of the duplicate of Springfield Township, I will ask you to read the entries on that page concerning the properties of Marianna Matthews and Mortimer Matthews.

A. Marianna Matthews, 1-4-35, north half part of 117.84 acre tract, 9 acres in School District 10; land, $1,590.00; building, $8,650.00; total, $10,240.00, on Matthews Avenue or Road, I suppose.

Q. Mr. Kuhn, I will ask you whether or not you have in your possession any documents which are public documents of the County of Hamilton that will give separate values of the buildings on that tract?

(Objected to by counsel for plaintiff. Objection overruled.)

A. Yes, sir.

Q. Will you read from those documents the separate values of the buildings contained on the Marianna Matthews' property south of the dotted line as shown on Exhibit 1?

(Objected to by counsel for plaintiff on the ground it is not relevant. Objection overruled subject to future ruling of the court and counsel for plaintiff excepted.)

A. They have one building here 96 x 66, 32 feet high, 9 rooms on the first floor, 9 on the second and 4 on the third. That is valued as the main building at $7,400.00. We have several small buildings, sheds, one 18 x 10, one 18 x 14, valued at $150.00. Those are the buildings south of the dotted line.

[fol. 163] By the Court:

Q. Are you reading from Marianna Matthews or Mortimer Matthews?

A. Marianna. There is a garage which is north of the dotted line valued at $600.00.

By Mr. Durr:

Q. Is there any reference on your duplicate or on the appraiser's report which you just read as to a conservatory or building other than you have just mentioned on the Marianna Matthews' property?

A. None that I can see.

(Counsel for plaintiff moved to rule out. Motion overruled and counsel for plaintiff excepted.)

Q. Will you read the next entry on page 106 of your tax duplicate?

A. Mortimer Matthews, 1-4-35, Southwest, 10 acres, School District 10. Land, $1,100.00; total, $1,100.00, on Matthews Road.

Q. Are there any buildings on that tract, Mr. Kuhn?

A. No, sir; no buildings charged on that tract.

Q. What was the valuation that the tax duplicate contained?

A. $1,100.00.

Q. Read the next item on page 106 of your tax duplicate.

A. Mortimer Matthews, 1-4-35, southwest, 40 acres, School District 10, land, $4,400.00.

Q. Are there any buildings shown on that tract?

A. No, sir; no buildings.

[fol. 164] Q. Now the next entry.

A. Mortimer Matthews, 1-4-35, north half, 87.59 acres in School District 10. Land, $10,790.00; building, $9,250.00; total, $20,040.00, on Matthews Road.

Q. Will you read from your appraiser's reports the valuation placed on the buildings located south of the dotted line that appear on plat marked Exhibit 1?

By Mr. Matthews:

Q. Which is the one that applies to the 87-acre tract?

A. In fact all of these apply to that. There is 1, 2, 3, 4, 5, 6, 7, 8, 9, 10. We have ten cards here that I have buildings on. I don't know which are south of that line. We have a description of every one on the card there, dimensions and height and purpose they are used for.

By Mr. Durr: I withdraw my question.

Q. I will ask you to read the appraiser's report as to the valuation of a two-story dwelling located on the 87.59 tract owned by Mortimer Matthews.

A. Two-story building, 4 rooms on the first floor, 4 on the second. Do you want any description?

Q. Just the valuation to identify it.

A. $1,200.00.

Q. I will ask you to read the appraiser's report describing a calf barn on the Mortimer Matthews' property.

A. 30 x 58, 16 feet high, cement floor, one floor high, valuation $1,200.00.

Q. Also as to a stable located on that tract.

[fol. 165] A. Stable, 58 x 38, 28 feet high, two floors, first floor frame, second floor stone, $1,200.00.

Q. Now as to a garage located in that tract.

A. I haven't any description of any garage.

Q. You have no record of a garage in that tract?

A. No, sir.

By Mr. Matthews:

Q. How much did you say the horse stable was?

By the Court: He said $1,200.00.

By Mr. Durr:

Q. Have you a record as to four chicken houses, Mr. Kuhn?

A. I have a record here; some shows 30 x 20, one 20 x 24. It does not state whether a chicken house or not.

Q. What is the value of those buildings?
A. Fifty dollars.
Q. That includes all of them as noted on that record?
A. Yes, sir; marked "sheds."
Q. Now as to the next entry on page 106 of your tax duplicate.
A. Mortimer Matthews, 1-4-35, south half, 59.78 acres in School District 10, land, $5,980.00; building, $850.00——

By Mr. Matthews: If your Honor please, I am making no point on the improvements on the 59-acre tract. I think it is encumbering the record to go into it.
[fol. 166] By the Court: He is reading from the tax duplicate?
By Mr. Durr: Yes.
By the Court: Proceed.

(Witness, continuing:) —total, $6,380.00, on the Matthews' Road.

By Mr. Durr:

Q. That includes lands and buildings, does it?
A. Yes, sir.
Q. Have you a record of the buildings on that tract?
A. Yes, sir.
Q. Will you read the record that you have?

By Mr. Matthews: I object. It is not in issue in this case.

(Objection overruled for future ruling of the court and plaintiff excepted.)

A. One 7-room house, main building, $700.00; 2 sheds 20 x 30, the other 20 x 40, valued at $150.00; total valuation, $850.00.

Cross-examination.

By Mr. Matthews:

Q. Will you kindly hand me the card about Mrs. Matthews' property. When were these cards made out, this card?
A. They were made out in 1917 in the fall of the year, around about October, I would judge.
[fol. 167] Q. You don't know how long that conservatory that you say was not represented here has been on that land, do you?
A. No, sir, I do not.
Q. Will you hand me the cards connected with Mortimer Matthews' valuations? When were these cards made out?
A. About the same time.
Q. 1917?
A. Yes, sir.
Q. You don't know, of course, whether certain chicken coops that you were asked about were there in 1920 or not, do you? You don't know of your own knowledge?
A. No, I don't.

Q. As I understand, the valuations placed by these cards on these three buildings south of the dotted line on Exhibit 1, the cottage and the horse stable and the calf barn were $1,200.00, which I understood you to say that is what is shown here?

A. Yes, sir.

Q. Now, I will ask you to give the values as they appear there of the buildings north of the dotted line on Exhibit 1?

(Objected to by counsel for defendant. Objection overruled subject to future ruling of the court and counsel for defendant excepted.)

A. I don't know exactly what buildings are up there.

Q. Find a cow barn. Is there something named a cow barn there?

[fol. 168] A. Yes, sir.

Q. What is that?

A. Cow barn, 42 x 20, 26 feet high, cement floor, $800.00.

(Counsel for defendant moved to strike out the answer. Motion overruled, subject to future ruling of the court and counsel for defendant excepted.)

Q. Is there another cow barn?

A. Yes, sir.

Q. What is the size of that?

A. 68 x 25, cement floor.

By Mr. Durr: I object to all this. Objection overruled, subject to future ruling of the court, and counsel for defendant excepted.)

Q. How much?

A. $1,200.00.

Q. Isn't that the calf barn south of the line?

A No, sir; it is marked cow barn.

Q. Are there some values given on silos there?

A. Yes, sir.

Q. Give them.

A. Silo, one 16 feet circumference, 40 feet high, one 16 feet ditto, 30 feet high, $500.00.

Q. Aren't there three silos?

A. I only have two. That is all there are.

Q. Is there a residence house there marked a dwelling house?

A. Are these houses supposed to be above the dotted line?

Q. Yes.

[fol. 169] A. That is something I don't know.

Q. I am not asking you for that. I am asking you to describe a dwelling house different from the one you gave south of the line.

A. Seven room house valued at $700.00.

Q. You don't know whether that is this house there or that house there, the house north of the line or south of the line of your own knowledge?

A. I do not.

Q. Is there anything shown there about a poultry house?

A. No, sir; there is not.
Q. Where you spoke of a barn 20 by something, turn to that again.
A. Sheds 30 x 20.
Q. I am not asking you about sheds. I am asking about a cow barn that was 20 by something.
A. Two cow barns here; one 30 x 58, 16 feet high, cement floor, one floor high, $1,200.00; cow barn, 68 x 25, 12 feet high, cement floor, $1,250.00.
Q. You don't know where those are located there, do you?
A. No, sir, I don't.
Q. What is the sum of the total valuations of buildings on this 87-acre tract?

By the Court: That is already in; he has read that.

By Mr. Matthews:

Q. Do these figures that you have given include all the buildings on that tract?
A. Yes, sir.
[fol. 170] Q. And they correspond with the $9,250.00 on the tax duplicate, do they?
A. I have not added them up; I won't say.
Q. Will you do that please? Confine yourself to the 87-acre tract.
A. Yes, sir, they do; $9,250.00.
Q. Going back to the card of Marianna Matthews. I notice sheds here $150.00. You don't mean to say of your own knowledge that amount represents the conservatory, do you? You don't know of your own knowledge?
A. No, sir.

GEORGE M. LEMMEL, called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Durr:

Q. Where are you employed?
A. County Surveyor's office.
Q. Of this county?
A. Hamilton County.
Q. How long have you been employed there?
A. About six years.
Q. Are you familiar with the Marianna and Mortimer Matthews property, Mr. Lemmel?
A. Yes, sir, I am.
Q. Have you ever been on that property?
A. Yes, sir.
Q. Do you know where the Glendale and Milford I. C. H. 46, Section X, Road is, do you not?

A. Yes, sir.

[fol. 171] Q. Have you ever had any occasion to take measurements on that road?

A. Well, in regard to improving of the road.

Q. Have you any plats or blueprints showing the measurements?

A. Yes, sir, I have.

Q. I hand you an ordinary blueprint and ask you whether you have seen this before?

A. Yes, sir, I made that plat, made a survey location of buildings.

Q. There are certain notations, pencil marks, appearing on the plat. Do you know how they came there?

A. Yes, sir, I got those from the Hamilton County Auditor's office.

Q. As I understand you, every mark on that blueprint was placed there by yourself. Is that correct?

A. Yes, sir.

By the Court:

Q. Where does Section X of the Glendale and Milford Road stop?

A. It goes all the way through to Milford, through Clermont County.

Q. Where does it stop?

A. At the Cincinnati-Dayton Pike, known as Reading Road 19.

By Mr. Durr: I offer the plat in evidence.

(Objected to by counsel for plaintiff.)

By the Court: The plat may go in, the values may go out.

[fol. 172] (Marked Defendant's Exhibit 1. Attached hereto and made a part hereof.)

By Mr. Durr:

Q. Directing your attention to the 10-acre tract owned by Mortimer Matthews. I will ask whether you have ever been on that land?

A. Yes, sir, I have.

Q. Is all or any part of that tract within one-half mile of the Glendale and Milford Road, Section X?

A. Yes, sir. there is 5.96 acres within the half-mile of Glendale and Milford Road, Section X.

Q. Is that shown on the plat, defendant's Exhibit 1?

A. Yes, sir.

Q. How it is shown?

A. Shown in lead pencil figures.

Q. Is there any other mark that would indicate what part of that tract was within the half-mile?

A. The dotted line, half-mile line known as——

By the Court: When you say half-mile you mean a direct line?

By Mr. Durr: Yes, sir, a direct line, if the court pleases.

Q. Do you know of your own knowledge what the tax value of that tract is, that part of the tract which lies south of the dotted line?
A. Well, from that part——

By the Court: Answer yes or no.

[fol. 173] A. No, sir, except from figuring the proportions of the total. There is no separate value of the Auditor's office on that portion.

(Question withdrawn.)

By the Court: The question is answered.
By Mr. Durr: The answer was not responsive.

Q. How many acres are contained south of the dotted line on the 10-acre tract?
A. 5.96 acres.
Q. Do you know of your own knowledge what amount was assessed against that part of the 10-acre tract?
A. $660.00.
Q. Are you sure of that?
A. Yes, sir, that is the total value of the land. The amount of the assessments, I don't remember the amount of the assessments.
Q. Did you figure the assessments?
A. Yes, sir.
Q. And what value did you place on that 10-acre tract for the purpose of figuring the assessment?
A. $660.00.
By the Court: Read the other question; also his answer.

(Question read by the stenographer.)

Q. Do you know of your own knowledge what amount was assessed against that part of the 10-acre tract?
"A. $660.00."

[fol. 174] By the Witness:

A. I did not understand the question when I answered $660.00 was assessed.

By Mr. Durr:

Q. Are any buildings on the 10-acre tract south of the dotted line shown on that tract?
A. No, sir.
Q. Directing your attention to a 40-acre tract owned by Mortimer Matthews, Mr. Lemmel, I will ask you whether you have ever been on that tract or not?
A. Yes, sir, I have.
Q. How many acres lie south of the dotted line as shown on that plat?
A. 9.76 acres.

Q. Is that amount of acres within one-half mile of the Glendale and Milford Road, Section X?

A. Yes, sir.

Q. Did you figure the assessment, the tentative assessment on that tract?

A. Yes, sir.

Q. What value did you place on those 9.76 acres for the purpose of estimating the tentative assessment?

A. $890.00.

Q. Directing your attention to the 87.59 acre tract. Have you ever been on that tract, Mr. Lemmel?

A. Yes, sir, part of it.

Q. How much of that tract lies south of the dotted line?

A. 44.07 acres.

[fol. 175] Q. Are there any buildings on that part of the tract which lies south of the dotted line?

A. Yes, sir.

Q. Have you seen those buildings?

A. Yes, sir.

Q. Can you describe them to the court?

A. Yes, sir. Do you want the dimensions of them? There is a two-story dwelling house, frame construction, 32:30; and there is a garage, frame construction, 12 x 20 feet by 16 feet, one-story; two-story horse stable, first floor is stone, second floor frame, and it also has a little concrete building in front of it between a concrete wall and a barn, all one-story, and there are four chicken coops 10 x 12. Those are all the buildings south, except one small shed 7.20 x 6.06 next to the horse stable.

Q. Are those buildings represented on the plat marked defendant's Exhibit 1?

A. Yes, sir.

Q. They all lie within one-half mile of the Glendale and Milford Road, Section X?

A. Yes, sir.

By Mr. Matthews: I don't want the witness to think any advantage is being taken of him. He did not mention the calf barn.

A. There is a calf barn 30 x 60, two-story. That is all the buildings within the half-mile.

By Mr. Durr:

Q. Directing your attention to the 59.78 acres. You have been on that land, have you?

A. Yes, sir.

[fol. 176] Q. How much lies south of the dotted line?

A. The total tract within a half-mile of the Glendale and Milford Road south of the dotted line.

Q. Any buildings on that tract?

A. Yes, sir.

Q. Have you seen them?
A. Yes, sir.
Q. Of what do they consist?
A. One dwelling house, frame, rather old and a shed, an old building.
Q. Directing your attention to the .45 acre tract. Have you seen that tract?
A. Yes, sir.
Q. Are there any buildings on it?
A. No, sir.
Q. How much of it lies south of the dotted line?
A. .45 acre.
Q. Directing your attention to the tract of land owned by Marianna Matthews. Have you ever been on that land?
A. Yes, sir.
Q. How many acres lie south of the half-mile line?
A. 7.10 acres.
Q. Are there any buildings on that portion which lies south of the half-mile line?
A. Yes, sir, there is a main building known as the residence, a greenhouse which is concrete, coal shed to it; in fact, two greenhouses; a wing to the main greenhouse and boiler room, dog kennel and tool shed and two other small sheds.
Q. Does any of the Mortimer Matthews property or Marianna Matthews property abut upon the Glendale and Milford Road, Section X?
[fol 177] A. No, sir, none abuts the Glendale and Milford Road.
Q. Have you had any experience in ascertaining the value of farm lands?
A. No, sir.
Q. Have you had any experience in ascertaining the value of buildings?
A. No, sir, I have not directly, only figuring costs of them.
Q. Are you in a position to testify as to the value of the building lying south of the one-half mile line, not as to the duplicate value, but as to the actual value?
A. Not exactly. I have not been in the buildings on the inside.

Cross-examination.

By Mr. Matthews:

Q. Mr. Lemmel, you say you were the person in the Surveyor's office who made the extension of all of the assessments for the Glendale and Milford Road Section X, are you?
A. Yes, sir.
Q. Now, when was it that you visited my property and Mrs. Matthews' property?
A. December, 1921; around December, 1921.
Q. And you had never been on the property before that, had you?
A. I have been in the territory, worked close to it.

Q. But you had never been on the property before?
A. Not on it.
[fol. 178] Q. I see in pencil you have marked here on this building north of the dotted line on the 87 acre tract between the dwelling and what is marked the calf barn, you marked that a cow barn. Do you know if that is a cow barn or not?
A. At the time I was there, there was a poultry house and your employes were enlarging your poultry house at the time and said it was a cow barn. It was so noted on the tax appraiser's card.
Q. Then that item marked as a second cow barn on the appraiser's cards is that building, is it?
A. From the size I would say it was.
Q. These chicken houses in a row marked south of the dotted line on defendant's Exhibit 1 were not built on any foundation, were they?
A. They were on what I would say 6 x 6, as I remember standing there.
Q. They were on sticks?
A. They were posts. The ground was on a slant and they had them on 6 x 6.
Q. To hold them up?
A. Yes, sir.
Q. Not on any stone or concrete foundation?
A. I don't remember; I didn't examine them.
Q. When you extended these assessments in the Surveyor's office, County Surveyor's office, you did it then without ever being on this property and seeing it?
A. Yes. No, sir, I have been over the ground and saw the ground that was to be assessed.
Q. I thought you said a little while ago you had not been on my property?
[fol. 179] A. I was not right on each tract. I have been in the territory and over the ground to be assessed within the half-mile of the Glendale and Milford Road.

ALBERT REINHARDT, called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Durr:

Q. Your occupation is what Mr. Reinhardt?
A. Clerk of the County Commissioners.
Q. As such clerk do you have under your control and custody records of the County Commissioners?
A. I do.
Q. Have you a record of the County Commissioners containing a report of a meeting held for the purpose of changing a portion of the Glendale and Milford Road, Section X?

A. I have not had much chance to look that matter up this morning, but it seems to me that the entire procedure with reference to the changing of that road was held by the State Highway Commissioners. If I remember right the petition was filed with that department and they advertised a date of hearing and set a day and had such a hearing.

Q. Were you present at that hearing?

A. I was at the meeting that day, yes.

Q. Do you remember when and where that meeting was held?

A. In the office of the County Commissioners on March 18, 1919, at one o'clock.

[fol. 180] Q. Have you any record in the County Commissioners' office as to what the result of that hearing was?

A. I have here a letter addressed to the County Commissioners and also one of Mr. Boeh, who was County Surveyor at that time.

Q. That letter is signed by whom?

A. Clinton Cowen, State Highway Commissioner.

Q. Do your minutes show the receipt of that letter, Mr. Reinhardt?

A. Yes, sir.

Q. Will you read that part of your minutes that show the receipt of that letter and tell us from which page you are reading and which volume?

A. This appears in Volume 61 of the minutes of the County Commissioners under date of April 1, 1919. "Columbus, Ohio, March 25, 1919. The Honorable Board of County Commissioners, Hamilton County, Cincinnati, Ohio."

By the Court: The question was to read that part of the minutes with reference to the receipt of this letter.

By Mr. Durr:

Q. Just read the receipt first. "For your information I beg to quote the following entry from the journal of the Highway Advisory Board."

By the Court: You have not understood his question. His question is, what do your records show as to the receipt of this letter?

A. Mr. Daley moved that the same be ordered received, filed and spread on the minutes.

[fol. 181] By Mr. Durr:

Q. Do your minutes show the contents of that letter, Mr. Reinhardt?

A. Yes, sir.

Q. Will you read that?

(Objected to by counsel for plaintiff. Objection overruled subject to future ruling of the court and counsel for plaintiff excepted.)

A. "Columbus, Ohio, March 25, 1919. The Honorable Board of County Commissioners, Hamilton County, Cincinnati, Ohio. Gentlemen: For your information I beg to quote the following entry from the journal of the Highway Advisory Board as of March 25, 1919, Hamilton County I. C. H. 46. Change in location granted. Report of Division Engineer Lerch with reference to a petition to a change in location of a portion of I. C. H. 46, Hamilton County, from the established route to the following was presented. 'Change the present location of the Glendale-Milford Road, I. C. H. 46 between the Carthage-Hamilton Road, I. C. H. 43 and the Cincinnati-Dayton Road, I. C. H. 19 to the Skillman Road 237.' The report of Division Engineer Lerch contained the following recommendation: 'After examining both routes and hearing the arguments for and against, I am of the opinion that the proposed route has been —.' They have a mistake on the minutes from the original copy. On our minutes it shows the word "been" instead of "better."

By the Court: Read it, Mr. Reinhardt, and then make your correction.

[fol. 182] A. "Proposed has been line and grade and will be more economic to construct and maintain. For these reasons I recommend that the change be made." "Commissioner Cowen: Change the location of a portion of Intercounty Highway 46, Hamilton County, from the existing location to the following: Change the present location of the Glendale and Milford Road, I. C. H. 46, between the Carthage and Hamilton Road, I. C. H. 43 and the Cincinnati-Dayton Road, I. C. H. 19, to the Skillman Road 237." On motion of Mr. Humphrey, seconded by Mr. Kerwin, the following resolution was adopted: "Resolved, by the Highway Advisory Board, that the action of the Highway Commissioner in changing the location of a portion of Intercounty Highway 46, Hamilton County, from the existing location to the location as shown above be approved." Vote "aye" Mr. McCullough, Mr. Humphrey, Mr. Kerwin and Mr. Harris. Very truly yours, Clinton Cowen, State Highway Commissioner, Secretary Highway Advisory Board."

Q. Make any explanation you want.

A. I see in reading off our minutes a mistake of one word. They have "been" instead of "better." It should read beginning at the word "proposed route has better line and grade" instead of "been line and grade."

Q. Do you know whether or not the meeting held in the Board of County Commissioners offices for the hearing of the petition proposing this change was advertised?

A. It was.

Q. Where and when?

[fol. 183] A. The advertisement appeared in the Commercial and the Enquirer on February 17, 24 and March 13, 1919.

(Counsel for plaintiff moved to rule out the answer. Motion overruled and counsel for plaintiff excepted.)

Q. Mr. Reinhardt, I hand you herewith a number of papers bound together and ask you whether you have seen them before?
A. Yes, sir.
Q. What are they?
A. Why, they are complete and correct transcripts of the proceedings of the Board of County Commissioners of Hamilton County, Ohio, having to deal with the proposed improvement of the Glendale and Milford Road, also known as Intercounty Highway 46, Section X.

By Mr. Durr: If your Honor please, this has already been placed in evidence, Exhibit 11.

Q. Mr. Reinhardt, do you know whether or not there was held a hearing for the purpose of hearing objections to the improvement of the Glendale and Milford Road, Section X, by the Board of County Commissioners?

(Objected to by counsel for plaintiff. Objection overruled and counsel for plaintiff excepted.)

A. There was.
Q. Do you know whether or not that meeting was advertised.
[fol. 183a] A. I would have to look at our transcript as I can not remember.

By the Court: Then he can not testify.

By Mr. Durr:

Q. If you don't know of your own knowledge then you can not testify.
A. I would say that there was.
Q. Do you know whether or not a meeting was held for the purpose of hearing complaints to assessments on the Glendale and Milford Road, Section X?
A. There was.
Q. Can you tell us of your own knowledge whether that meeting was advertised?
A. It was.
Q. Can you tell us of your own knowledge where and how many times the first meeting you spoke of was advertised?

(Objected to by counsel for plaintiff.)

A. I can not just remember without consulting my records.
Q. Can you tell us of your own knowledge where and how many times the hearing for the purpose of hearing objections to the assessment was advertised?
A. Without consulting the records I can not remember how many times it was, but it was advertised.
Q. Can you tell us of your own knowledge whether there were any objections filed in writing to the proposed improvement of the

[fol. 183b] Glendale and Milford Road, Section X, at the first hearing?

A. I can not without refreshing my memory from my records.

Q. Can you tell us of your own knowledge whether there were any objections filed to the tentative assessment roll of the Glendale and Milford Road, Section X?

A. I can not without testifying from my records.

Q. Can you secure and bring with you the records of your office that would contain that information?

A. I can.

Further hearing adjourned until 1:30 p. m., February 23, 1922.

Afternoon Session,

February 23, 1922—1:30 p. m.

ALBERT REINHARDT, recalled for further direct examination:

By Mr. Durr:

Q. Now, Mr. Reinhardt, have you with you the records of the County Commissioners' office containing the report of a meeting held to hear objections to the proposed improvement of the Glendale and Milford Road, Section X?

A. I have.

Q. Will you read the record so far as that meeting is concerned?

A. This is the resolution which the Board of County Commissioners passed Friday, May 28, 1920, which was the day set for hear-
[fol. 184] ing any objections and claims in the way of damages to property, etc.

Q. Do your minutes disclose whether there were any objections filed?

A. They do not.

Q. Would they disclose ordinarily whether objections were filed or not?

(Objected to by counsel for plaintiff.)
(Question withdrawn.)

Q. If there had been objections filed would your minutes disclose that?

(Objected to by counsel for plaintiff. Objection overruled and counsel for plaintiff excepted.)

A. Not in every instance.

Q. In this instance?

A. I believe they would.

(Counsel for plaintiff moved to strike out the answer. Motion granted.)

Q. Mr. Reinhardt, if any objections were filed in writing with your Board would your minutes disclose whether they had been filed or not?

A. They would.

Q. Now, directing your attention to the record of the Commissioners' office having to do with the hearing on the assessments for the Glendale and Milford Road, Section X, I will ask you to read what your minutes contain.

A. This is in Volume 64, page 571, under date of July 9, 1920.

[fol. 185] By Mr. Matthews: I object to it being read. It is an objection filed by another party, not myself. I do not see what relevancy it has in this case.

(Objection overruled subject to future ruling of the court and counsel for plaintiff excepted.)

A. The following communication was presented on the Glendale-Milford Road, Section X, I. C. H. 46. "Cincinnati, Ohio, July 8, 1920. To the Honorable Board of County Commissioners, Hamilton County, Ohio. Gentlemen: Proposed improvement of Glendale-Milford Road, I. C. H. 46. Referring to the proposed improvement of the above road I wish to herewith file objections to the assessment proposed against the Big Four Railway for said improvement on the following grounds: First: That we are not benefitted. Second: Practically all the ground on which the assessment is based is now being used for railroad purposes or is being held for future development of railroad purposes. Third: As soon as this yard development is completed we propose to erect a viaduct over the tracks leaving the road for practically the entire distance it fronts on our property. Referring further to No. 1: We have had a great deal of experience recently with the operation of yard roads and it has been our experience and observation that these roads take business away from the railroads and develop into an actual competitor of the railroads. They are, therefore, not a benefit, but a positive handicap to the railroads. In all justice we should not be expected to provide facilities for our competitors. Referring to No. 2: We have plans drawn now for a [fol. 186] considerable development of this yard property and would have had it started if we could have gotten the steel. For your information I attach herewith blueprint showing part of our plans and proposed layout and rearrangement of the tracks. We are waiting only on the steel to start this work. Referring to No. 3: As soon as we have this yard layout completed we propose to erect a viaduct along this wagon road, elevating same over our tracks for practically the entire distance it fronts on our property. I attach herewith for your information a blueprint showing this proposed viaduct. We will not, of course, be able to build this viaduct this year as we have been delayed on our yard project on acount of not being able to get material, but it does look extravagant at least to build a hard road along this property and within a year or so tear it up and erect a viaduct, especially if we are forced to pay a portion of the cost of the road. While it is a fact that we have some of this viaduct ground rented at present, the

contracts provide we are at liberty at any time to dispossess them regardless of crops, etc., if we are able to get steel in sufficient quantities to start this yard improvement work. Hoping you gentlemen can see your way clear to relieve us of at least the greater part of this assessment, I remain, H. E. McGinnis, Special Tax Agent."

Q. Do your records show any objection to the assessment filed in writing by Mortimer Matthews or Marianna Matthews?

A. If they have there is nothing of record to show it.

[fol. 187] Q. If they had been filed would they have been entered upon your minutes?

A. I believe that they would.

Cross-examination.

By Mr. Matthews:

Q. Mr. Reinhardt, you have referred to two meetings. Do your records show the parties who were present at either of those meetings?

A. To what dates do you refer?

Q. I refer to the two you referred to. The first one was in regard to the resolution to go ahead with the building of this Intercounty Highway and the second one was where you just read from where the Big Four put in an objection.

A. Our records don't show who were present at that meeting except the Board of County Commissioners and legal counsel and clerks. The reason I don't record that all objections are supposed to be in writing. Any verbal objection we don't take note of it.

Q. Do you know as a matter whether or not a number of people were present at those two meetings?

A. I don't recall. We have had so many road proceedings up I don't remember that particular instance.

Q. In these road proceedings for Intercounty Highways the public generally attends it, a great many of the public.

A. Where the state co-operates in the building of the road, yes.

[fols. 188-197] Q. Representatives of the Automobile Club in the city come there and urge the County Commissioners to go into building Intercounty Highways by state aid.

A. What?

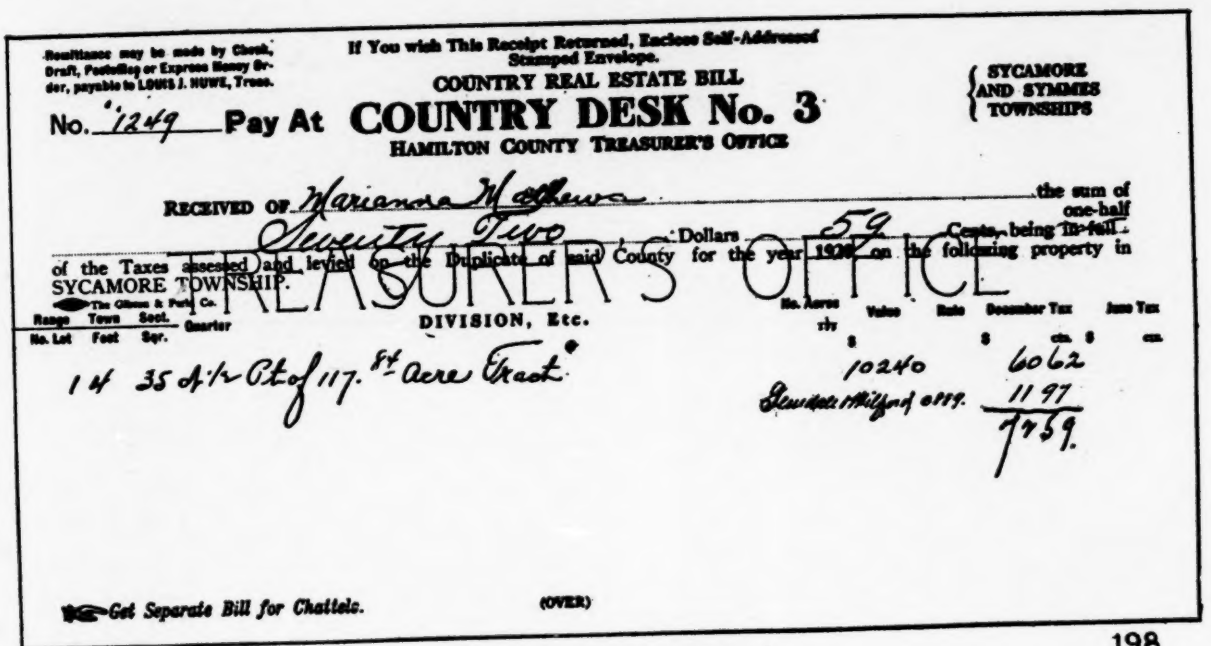
Q. Don't representatives of the Automobile Club in the city come there and urge the County Commissioners to build these Intercounty Highways?

A. At times, yes.

Q. You don't remember whether th eAutomobile Club, The Cincinnati Automobile Club was represented at any of these meetings of the Glendale and Milford Road?

A. I do not.

(Here follows Plaintiff's Exhibit No. 2, marked side folio page 198.)



Remittance may be made by Check, Draft, Postoffice or Express Money Order, payable to LOUIS J. HUWE, Treas.

If You wish This Receipt Returned, Enclose Self-Addressed Stamped Envelope.

COUNTRY REAL ESTATE BILL

{ SYCAMORE AND SYMMES TOWNSHIPS

No. 1249 Pay At **COUNTRY DESK No. 3**

HAMILTON COUNTY TREASURER'S OFFICE

RECEIVED OF Marianna Matthews the sum of one-half

Seventy Two Dollars 59 Cents, being in full

of the Taxes assessed and levied on the Duplicate of said County for the year 1920 on the following property in SYCAMORE TOWNSHIP.

TREASURER'S OFFICE

The Gibson & Perry Co.

Range Town Sect. Quarter

No. Lot Feet Sqr. DIVISION, Etc.

No. Acres	Value	Rate	December Tax	June Tax
rly	$		$ cts.	$ cts.
1 of 35 A 1/2 Ct of 117. 84 Acre Tract	10240		60 62	
Gen. Tax. Milford 0119.			11 97	
			72 59.	

Get Separate Bill for Chattels. (OVER)

PLAINTIFF'S EXHIBIT 2

[fol. 199] PLAINTIFF'S EXHIBIT 3

The Title Guarantee and Trust Co., Title Guarantee Building, S. E. Cor. Court and Main Sts., Cincinnati, Ohio

Order No. 21941

Mortimer Matthews, Atty.-at-Law, City.

DEAR SIR: In re your application for assessments appearing of record against the lands owned by yourself and wife, Marianna Matthews, in Sycamore Township, Hamilton County, Ohio, levied for the purpose of improving Section "X" of the Glendale-Milford Road, an Intercounty Highway, together with assessments of record against other lands in the same locality for comparison respectively of rate and amount of such assessments, we desire to report as follows:

Record of Assessments for Improvement of County Roads

Section "X," Glendale-Milford Road, Sycamore Township, Book "O," Page 888, Twenty One-half Year Payments

No. 1. Mortimer Matthews, Section 1-4-35.	59.78 acres.	Assessment.....	$303.58		
		Interest.....	182.15		
				Total,	$485.73
		Book "O," page 889:			
No. 2. Mariana Matthews, Section 1-4-35.	7.10 acres.	Assessment.....	$149.55		
		Interest.....	89.73		
				Total,	$239.28
		Book "O," page 890:			
No. 3. Mortimer Matthews, Section 1-4-35.	5.96 acres.	Assessment.....	$29.93		
		Interest.....	17.96		
				Total,	$47.89

Record of Assessments for Improvement of County Roads—Continued

		Book "O," page 891:		
No. 8. Henry Moeller, Archbishop, Section 1-4-35.	10.00 acres.	Assessment..... $136.39 Interest..... 81.83	Total,	$218.22
		Book "O," page 892:		
No. 9. Henry Moeller, Archbishop, Section 1-4-35.	10.00 acres.	Assessment..... $134.86 Interest..... 80.92	Total,	$215.78
		Book "O," page 892:		
No. 10. Henry Moeller, Archbishop, Section 1-4-35.	10.00 acres.	Assessment..... $121.26 Interest..... 72.76	Total,	$194.02
		Book "O," page 891:		
No. 11. Henry Moeller, Archbishop, Section 1-4-35.	9.21 acres.	Assessment..... $49.54 Interest..... 29.72	Total,	$79.26
		Book "O," page 893:		
No. 12. Henry Moeller, Archbishop, Section 1-4-35.	7.43 acres.	Assessment..... $84.16 Interest..... 50.50	Total,	$134.66
Total.....	237.56 acres.	Total Assessments.....		$4,661.29

[fols. 201 & 202] PLAINTIFF'S EXHIBIT 5

Order No. 21941

We are giving you for comparison of your smaller and separate tracts the assessments levied against two other tracts in the same vicinity owned by Ella White, Henry and Emma Trautman, respectively and fronting on the highway to be improved by said assessments.

		Book "O," page 903:		
Ella White, Section 1-4-35.	7.50 acres.	Assessment.....	$105.39	
		Interest.....	63.23	
			Total,	$168.62
		Book "O," page 885:		
Henry and Emma Trautman, Section 1-4-35.	7.32 acres.	Assessment.....	$121.31	
		Interest.....	72.79	
			Total,	$194.10
A. E. Gregory, Section 1-4-35.	2.50 acres.	Assessment.....	$21.19	
		Interest.....	12.71	
			Total,	$33.90

Respectfully submitted,

CTM/HB.

The Title Guarantee & Trust Co., per —— ——, Secretary.

PLAINTIFF'S EXHIBIT 6—Filed May 24, 1923

County Commissioners' Office, Hamilton County, Ohio

Jacob Krollman, President; Charles F. Harding, Hamlin Harper Commissioners; Albert Reinhardt, Clerk

Cincinnati, November 29, 1921.

To whom it may concern:

This is to certify that there does not appear of record in the minutes of the Board of County Commissioners of Hamilton County Ohio, any petition from the property holders requesting the said Board of Commissioners to apply for State Aid for the improvement of the Glendale-Milford Road, Intercounty Highway No. 46, Section "X."

In Witness Whereof, I have hereunto set my hand and affixed the Official Seal of the Office of the Board of County Commissioners of Hamilton County, Ohio, this 29th day of November, A. D. 1921

Albert Reinhardt, Clerk Board of County Commissioners of Hamilton County, Ohio.

[fol. 203] PLAINTIFF'S EXHIBIT 11—Filed May 24, 1923

Cincinnati, Ohio, August 30, 1920.

To whom it may concern:

It is hereby certified that the attached is a true and correct transcript of complete proceedings of the Board of County Commissioners of Hamilton County, Ohio, having to do with the proposed improvement of the Glendale-Milford Road, also known as Intercounty Highway No. 46, Section X.

In witness whereof, I have hereunto set my hand and affixed the Official Seal of the Office of the County Commissioners of Hamilton County, Ohio, this 30th day of August, A. D. 1920.

(Signed) Albert Reinhardt, Clerk Board of County Commissioners, Hamilton County, Ohio.

Commissioners' Mins., Vol. 64, pages 159, 173.
April 13, 1920.

Hamilton County Commissioners' Office

Cincinnati, Ohio, Tuesday, April 13, 1920.

Pursuant to adjournment on Friday — 9, 1920, the Board met in session this A. M. Present Messrs. Bauer, Daly and President Mittendorf, and, Assistant Prosecuting Attorney, Chester S. Durr. The minutes of the previous meeting were read and approved.

[fol. 204] The following resolution was presented and on motion of Mr. Daly adopted:

Resolution of County Commissioners Applying for State Aid

By the Board: Glendale-Milford Intercounty Highway No. 46:

Be it resolved by the Board of County Commissioners of Hamilton County, Ohio:

That the public interests demand the improvement under the provisions of Section 1178 to 1231-11, inclusive, of the General Code of Ohio of that part of Intercounty Highway No. 46, situated in the County of Hamilton and described as follows:

"Beginning at the Carthage-Hamilton Road, I. C. H. 43, thence along the line of the Glendale-Milford Road, I. C. H. 46, to the Miami River in Springfield, Sycamore and Symmes Townships, in all a distance of 9.1 miles;" and,

Be it further resolved, that we, the Commissioners of said county do hereby make application to the State Highway Commissioner for aid from any fund available for the construction of Intercounty Highways, and we do hereby agree for and on behalf of said county to pay in the first instance from the funds of said county one-half of the cost and expense of surveys and other expenses preliminary to the construction of said highway.

(Signed) A. E. Mittendorf, Martin Daly, C. F. Bauer, Commissioners of Hamilton County.

Bauer, aye. Daly, aye. Mittendorf, aye.

[fol. 205] Commissioners' Mins., Vol. 64, pages 234 and 250.
April 30, 13920.

Hamilton County Commissioners' Office

Cincinnati, Ohio, Friday, April 30, 1920.

Pursuant to adjournment on Tuesday, April 27, 1920, the Board met in session this A. M. Present Messrs. Bauer, Daly, President Mittendorf and Assistant Prosecuting Attorney, C. S. Durr. The minutes of the previous meeting were read and approved.

Following communication was presented.

Columbus, Ohio, April 16, 1920.

Clerk Board of County Commissioners, Hamilton County, Cincinnati, O.

Dear Sir: The application filed with the State Highway Department by your Board of County Commissioners, requesting state aid on a portion of the Glendale-Milford, I. C. H. No. 46, Petition No. 3884, in Springfield, Sycamore and Symmes Townships, Hamilton County, and described as follows:

"Beginning at the Carthage-Hamilton Road, I. C. H. 43, thence along the line of the Glendale-Milford Road, I. C. H. 46, to the Miami River,"

has been investigated by the State Highway Commissioner, and after taking into account the use, location and value of such sections of [fol. 206] highway thereof for the purpose of common traffic and travel, it has been determined to be of sufficient public importance to come within the provisions of amended Sections 1178 to 1231-11, General Code of Ohio.

I hereby certify my approval of said application.

Yours very truly, A. R. Taylor, State Highway Commissioner.

And Mr. Bauer moved that the same be ordered received and filed. Bauer, aye. Daly, aye. Mittendorf, aye.

Commissioners' Mins., Vol. 64, pages 28, 281.
May 11, 1920.

Hamilton County Commissioners' Office

Cincinnati, Ohio, May 11, 1920.

Pursuant to adjournment on Friday, May 7, 1920, the Board met in session this A. M. Present Messrs. Bauer, Daly, President Mittendorf and Assistant Prosecuting Attorney, Chester S. Durr.

The minutes of the previous meeting were read and approved.

The following resolution was presented and on motion of Mr. Daly adopted:

Resolution by the board declaring it necessary, determining the method of paying for the cost and setting forth the route and [fol. 207] termini of the proposed improvement of the Glendale-Milford Road, also known as Intercounty Highway No. 46, Section X.

Whereas, The Board of County Commissioners of Hamilton County, Ohio, all members duly elected thereto concurring, did on Tuesday, April 13, 1920, adopt a resolution declaring that the public interests demands the improvement of the Glendale-Milford Road, also known as I. C. H. No. 46, situated in the County of Hamilton; and

Whereas, having made application to the State Highway Commission for State Aid in said improvement, and said Highway Commission having agreed to make an appropriation for said improvement; and

Whereas, The Board of County Commissioners of Hamilton County, Ohio, have determined and do hereby agree to pay all the expenses and costs of said improvement over and above the amount received from the State Highway Commission;

Now, therefore, be it resolved, that the Board of County Commissioners of Hamilton County, Ohio, all members duly elected thereto concurring, hereby declare it necessary to improve that part of the Glendale-Milford Road, also known as Intercounty Highway No. 46, beginning at the point where Intercounty Highway No. 46 intersects Intercounty Highway No. 43, thence east along the route of Intercounty Highway No. 46 to the point where Intercounty Highway No. 46 intersects with Intercounty Highway No. 19, being all in Springfield and Sycamore Townships, Hamilton County, Ohio, and comprising a distance of about two and fifty-seven one-hundredths (2.57) miles, designated and hereafter to be known as Sec-
[fol. 208] tion X of the Glendale-Milford Road, also known as Intercounty Highway No. 46; and

Be it further resolved, that the County of Hamilton pay all the expenses and costs of the improvement over and above the amount contributed by the state, and over and above the amount to be raised by assessment, said assessment to be levied on all property lying within one-half (½) mile on both sides of the proposed improvement, in accordance to the benefits thereto, and to be that part of the entire cost of the improvement as is represented by ten (10%) per cent of the most expensive type of improvement contemplated in the plans, profiles, specifications and estimates, excepting therefrom the cost and expense of bridges and culverts, and the remainder of said county's portion to be paid by the county and taxed against all the taxable property in the county. All contributions and rights of contributions that may accrue to the county from the townships in which said improvement is located, by reason of the statutes in such case made and provided, are hereby specifically waived by the Board of County Commissioners; and

Be it further resolved, that the sum to be raised by assessment, heretofore determined to be ten (10%) per cent of the entire cost of the improvement, excepting therefrom the cost of bridges and culverts, is to be raised by levying against all the property lying within one-half (½) mile on both sides of the improvement in accordance with the following plan, to-wit:

The total sum to be raised by assessment shall be divided into three (3) equal parts;

[fol. 209] That one of said parts shall be assessed against the property abutting the improvement in proportion to the number of front feet contained in each part, parcel, tract and lot which abuts the said improvement;

That the second part thereof shall be assessed against all the property coming within the purview of said improvement in proportion to the acreage or area thereof;

That the remaining one-third of said assessment be assessed against all the property coming within the purview of said improvement in proportion to the tax valuation of each part parcel, tract and lot involved as the same appears on the tax duplicate of this county.

This resolution to be in full force and effect from and after the earliest period allowed by law.

Passed at a regularly adjourned meeting of the Board of County Commissioners of Hamilton County, Ohio, this 11th day of May, A. D. 1920.

A. E. Mittendorf, Martin Daly, C. F. Bauer, County Commissioners of Hamilton County, Ohio.

Attest: Albert Reinhardt, Clerk.

Bauer, aye. Daly, aye. Mittendorf, aye.

Following resolution was presented and on motion of Mr. Bauer adopted:

Resolution by the board notifying property owners and all persons [fol. 210] interested that Section "X" of the Glendale Milford Road, also known as Intercounty Highway No. 46, is to be improved, and that plans and specifications are on file in the office of the County Commissioners, and fixing a date for hearing objections, claims for compensation for lands and property to be taken or damages sustained on account thereof:

Whereas, The Board of County Commissioners of Hamilton County, Ohio, all members duly elected thereto concurring, have heretofore adopted a resolution declaring it necessary to improve that part of the Glendale-Milford Road, also known as I. C. H. No. 46, and known and designated as Section "X", and have determined the method of paying for the cost of said improvement; and

Whereas, Plans, specifications, profiles and estimates, duly and properly approved by the State Highway Commission, have been received by the Board of County Commissioners, and are now on file in their office at the Court House, Cincinnati, Hamilton County, Ohio;

Now, Therefore, Be it Resolved, That this resolution constitute a Notice to Property Owners and all persons interested, that the said improvement is to be made, and that plans, specifications, profiles and estimates therefor are now on file in this office; and

Be it Further Resolved, That the Clerk of the Board of County Commissioners be and he is hereby directed to have this resolution published once each week for two (2) consecutive weeks, in a newspaper published and of general circulation in said county, as a notice to property owners and all persons interested, that the improvement above referred to is to be made; that copies of the plans, [fol. 211] specifications, profiles and estimates are on file in the office of the County Commissioners and at the office of the State Highway Commission at Columbus, Ohio, and that a public hearing will be held in the office of the Board of County Commissioners of Hamilton County, Ohio, on the 28th day of May, A. D. 1920, at 11 o'clock A. M., for the purpose of hearing claims for compensation for lands and property to be taken and damages sustained by and on account of said improvement.

This resolution shall also be notice to the persons above referred to, that unless their claims are filed in writing on or before the date and time of hearing, they shall be considered waived.

This resolution to be in full force and effect from and after the earliest period allowed by law.

Passed at a regularly adjourned meeting of the Board of County Commissioners of Hamilton County, Ohio, this 11th day of May, A. D. 1920.

A. E. Mittendorf, Martin Daly, C. F. Bauer, Board of County Commissioners, Hamilton County, Ohio.

Attest: Albert Reinhardt, Clerk.

Bauer, aye. Daly, aye. Mittendorf, aye.

STATE OF OHIO,
Hamilton County, ss:

Personally appeared before me, a Notary Public in and for Hamilton County, James V. Lewis, for publishers of the Cincinnati Com-
[fol. 212] mercial Tribune, who being duly sworn says, that the copy of the advertisement as appears below attached to this page, was published in the Commercial Tribune, a newspaper printed and of general circulation in said county, and in the State of Ohio, on May 13 and May 20, 1920.

(Signed) James V. Lewis.

Sworn to and subscribed in my presence this 28th day of August, A. D. Nineteen Hundred and Twenty. (Signed) P. A. MacKenna, Notary Public within and for Hamilton County, Ohio.

(Copy of advertisement of resolution adopted May 11, 1920, was attached to this page of the original transcript, this transcript being a copy of the original.)

Commissioners' Mins., Vol. 64, page 361.
May 28, 1920.

Hamilton County Commissioners' Office

Cincinnati, Ohio, Friday, May 28, 1920.

Pursuant to adjournment on Tuesday, May 25, 1920, the Board met in session this A. M. Present: Messrs. Bauer, Daly, President Mittendorf and Assistant Prosecuting Attorney, C. S. Durr.
[fol. 213] Following resolution was presented and on motion of Mr. Daly adopted:

By the Board: Resolution determining to proceed with the improvement of the Glendale-Milford Road, Intercounty Highway No. 46, Section X, adopting plans and specifications, instructing the

County Surveyor to make an estimated assessment upon the real estate to be charged.

Whereas, the Board of County Commissioners of Hamilton County, Ohio, all members duly elected thereto concurring, have adopted a resolution declaring it necessary to improve that part of the Glendale-Milford Road, Intercounty Highway No. 46, known and designated as Section X of the Plans and Specifications for said improvement; and

Whereas, They have duly notified by publication in a newspaper published and of general circulation in Hamilton County, all persons interested in said improvement, that all claims for compensation for land to be taken and damages sustained would be heard by said Board of County Commissioners at their office in the Court House, Cincinnati, Ohio, at 11 o'clock A. M., Friday, May 28, 1920, and that if said claims for compensation and for damages were not filed in writing on or before that time and date, said claims for compensation and for damages would be considered waived, except as to minors and persons under disability; and

[fol. 214] Whereas, Said Board of County Commissioners, all members duly elected thereto concurring, have heard and carefully considered all objections made by persons interested in said improvement, and having given them due and careful consideration, unanimously find the benefits resulting from the improvement are and will be immeasurably greater to the public interest than the objections thereto;

Now, Therefore, Be it Resolved, That the Board of County Commissioners of Hamilton County, Ohio, hereby determine to proceed with the improvement of that part of the Glendale-Milford Road, Intercounty Highway No. 46, known as Section X, in accordance with the plans and specifications now on file in the office of the Board of County Commissioners, which plans and specifications are hereby adopted and approved by said Board.

Be it Further Resolved, That the County Surveyor be and hereby is directed to make by actual view an estimated assessment upon the real estate to be charged in accordance with the resolution heretofore unanimously adopted by the Board of County Commissioners.

Be it Further Resolved, That the Clerk of this Board be and he is hereby directed to transmit to the State Highway Commission a certified copy of this resolution.

Passed at a regularly adjourned meeting of the Board of County Commissioners of Hamilton County, Ohio, this 28th day of May, A. D. 1920.

Bauer, aye. Daly, aye. Mittendorf, aye.

[fol. 215] Commissioners' Letter File.
May 28, 1920.

May 28, 1920.

Hon. A. R. Taylor, State Highway Commissioner, Columbus, Ohio.

DEAR SIR: Herewith please find certified copy of resolution adopted by the Board of County Commissioners of Hamilton County, Ohio, under date of May 28, 1920.

Respectfully, Albert Reinhardt, Clerk Board of County Commissioners, Hamilton County, Ohio.

May 28, 1920.

Hon. E. A. Gast, Surveyor Hamilton County, Court House, City.

DEAR SIR: Herewith please find certified copy of resolution adopted by the Board of County Commissioners of Hamilton County, Ohio, under date of May 28, 1920.

Respectfully, Albert Reinhardt, Clerk Board of County Commissioners, Hamilton County, Ohio.

(This page in the original transcript [of which this is a copy of the original transcript] contained certified copy of resolution adopted May 28, 1920, copy being sent to A. R. Taylor and E. A. Gast.)

[fol. 216] Commissioners' Mins., Vol. 64, pages 476-486.
June 22, 1920.

Hamilton County Commissioners' Office

Cincinnati, Ohio, Tuesday, June 22, 1920.

Pursuant to adjournment on Friday, June 18, 1920, the Board met in session this A. M. Present: Messrs. Bauer, Daly, President Mittendorf and Assistant Prosecuting Attorney, Chester S. Durr. The minutes of the previous meeting were read and approved.
Following report was submitted:

Cincinnati, Ohio, June 11, 1920.

Honorable Board of County Commissioners.

GENTLEMEN: As per your Resolution, passed May 28, 1920, I herewith hand you estimated assessment against property for the improvement on Glendale-Milford Road, I. C. H. 46, Section X.

Respectfully, E. A. Gast, County Surveyor.

And Mr. Daly moved that the same be ordered received and filed. Bauer, eye. Daly, aye. Mittendorf, aye.

[fol. 217] Following resolution was presented and on motion of Mr. Daly adopted:

By the Board: Resolution fixing the date for hearing objections to assessments on the Glendale-Milford Road, Intercounty Highway No. 46, Section X.

Whereas, the Board of County Commissioners of Hamilton County, Ohio, all members duly elected thereto concurring, have agreed to pay all costs of the improvements of the Glendale-Milford Road, I. C. H. No. 46, Section X, over and above the amount contributed by the state; and

Whereas, the Board has determined to raise part of the sum to be paid by the county by assessing ten per cent of the most expensive type of improvement contemplated in the plans, profiles, specifications and estimates, which will be at least ten per cent of the entire cost of the improvement, against the abutting property owners lying within one-half mile of both sides of the improvement; and

Whereas, the amount to be paid by the county by the levying of the General Duplicate, in accordance with the estimates submitted and approved is $103,192.85, hereinafter called the "County's Portion," and the amount to be raised by assessing property is $15,607.15, making a total of $118,800.00; and

Whereas, the County Surveyor has filed an estimated assessment against the property coming within the purview of the improvement [fol. 218] and lying within one-half mile of either side of said Glendale-Milford Road, Section X, and has proportioned the total amount to be raised by assessing said property in accordance with the plans heretofore adopted by the said Board of County Commissioners, and in accordance with law;

Therefore, be it resolved, by the Board of County Commissioners of Hamilton County, Ohio, that said estimated assessment be advertised according to law; and

Be it further resolved that the Clerk of this Board be and he is hereby directed to advertise once each week in a newspaper published and of general circulation in Hamilton County Ohio, for two (2) consecutive weeks, a notice that the estimated assessments have been made and are on file in the office of the County Commissioners at the Court House, Cincinnati, Ohio, and that objections, if any, to said assessments will be heard at 11 o'clock A. M., on the 9th day of July, 1920.

Said notice shall also notify all persons interested that objections and claims, if any, must be filed in writing on or before the time and date of hearing, or the same will be considered waived, except as to minors and persons under disability.

This resolution to be in full force and effect from and after the earliest period allowed by law.

Bauer, aye. Daly, aye. Mittendorf, aye.

STATE OF OHIO,
Hamilton County, ss:

Personally appeared before me a Notary Public in and for Hamilton County, James V. Lewis, for publishers of the Cincinnati Com-

[fol. 219] mercial Tribune, who, being duly sworn says, that the copy of the advertisement as is attached to this page, was published in the Commercial Tribune, a newspaper printed and of general circulation in said county, and in the State of Ohio, on June 24 and July 1, 1920.

James V. Lewis.

Sworn to and subscribed before me this 28th day of August, A. D. 1920. P. A. MacKenna, Notary Public within and for Hamilton County.

Legal Notice

To owners of property lying within one-half mile on either side of the Glendale-Milford Road, Section "X," also known as Intercounty Highway No. 46, beginning at the point where I. C. H. No. 46 intersects I. C. H. No. 43; thence east along the route of I. C. H. No. 46 to the point where I. C. H. No. 46 intersects with I. C. H. No. 19, being in all a distance of about 2.50 miles, in Springfield and Sycamore townships, and to all persons interested therein:

Notice is hereby given by the Board of County Comissioners of Hamilton County, Ohio, that the County Surveyor has filed in their office at the Court House, Cincinnati, Ohio, the estimated assessments against all the property lying within one-half (½) mile on either side of the proposed improvement of the Glendale-Milford Road, Section "X," also known as Intercounty Highway No. 46, beginning at the point where Intercounty Highway No. 46 intersects Intercounty Highway No. 43; thence east along the route of [fol. 220] Intercounty Highway No. 46 to the point where Intercounty Highway No. 46 intersects with Intercounty Highway No. 19, being in Springfield and Sycamore Townships, a distance of 2.50 miles, and that said estimated assessments can be seen by all persons interested between the hours of 9 A. M. and 4 P. M. daily except Saturday afternoons and Sundays.

A public hearing will be held at the office of the Board of County Commissioners, at the Court House, Cincinnati, Ohio, at 11 o'clock A. M., Friday, July 9, 1920, for the purpose of hearing objections to said assessments. Said objections must be filed in writing with the County Commissioners before the time for said hearing, and if not filed will be considered waived.

June 24, 1920.

A. E. Mittendorf, Martin Daly, C. F. Bauer, County Commissioners of Hamilton County, Ohio.

Attest: Albert Reinhardt, Clerk.

Commissioners' Mins., Vol. 64, pages 549, 571, 572, 573, 574, 575.

July 9, 1920.

Hamilton County Commissioners' Office

Cincinnati, Ohio, Friday, July 9, 1920.

Pursuant to adjournment on Tuesday, July 6, 1920, the Board [fol. 221] met in session this A. M. Present, Messrs. Bauer, Daly, President Mittendorf and Assistant Prosecuting Attorney C. S. Durr. The minutes of the previous meeting were read and approved.

Following resolutions were presented and on motion of Mr. Daly, adopted:

Resolution by the Board confirming assessments and certifying the same to the county auditor for collection on property lying within one-half mile of either side of the Glendale-Milford Road, Intercounty Highway No. 46, Section "X".

Whereas, Notice has heretofore been given that the County Surveyor has filed in the office of the Board of County Commissioners of Hamilton County, Ohio, an estimated assessment upon the real estate to be charged with the portion of the cost and expense of improving the Glendale-Milford Road, I. C. H. 46, Section X, as determined by the Board, and of the time of hearing objections if any to said assessment; and

Whereas, Such apportionment is according to the benefits which will result in said real estate; and

Whereas, No valid objections have been filed to said assessment: Now, Therefore, Be it Resolved, That said estimated assessment be and the same are hereby approved; and

Be it Further Resolved, That all unpaid assessments be certified [fol. 222] to the County Auditor and placed by him upon a special duplicate to be collected as other taxes in twenty semi-annual instalments as provided by law, with interest added thereto at the same rate as will be borne by bonds issued in anticipation of the collection thereof, if such bonds are issued; that is to say, one instalment on or before the first day of February and one instalment on or before the first day of August of each year, beginning February 1, 1921, and continuing each year until all assessments have been paid. Said Board of County Commissioners hereby declare its intention to issue and sell bonds of said county in anticipation of the collection of the aggregate of the unpaid assessments.

Adopted at a regular adjourned meeting of the Board of County Commissioners of Hamilton County, Ohio, this 9th day of July, A. D. 1920.

Bauer, aye. Daly, aye. Mittendorf, aye.

Resolution by the Board directing the clerk of the Board to certify assessments to the county auditor on property lying within one-half mile of either side of the Glendale-Milford Road, Intercounty Highway No. 46, Section "X".

Be it Resolved, by the Board of County Commissioners of Hamilton County, Ohio, all members duly elected thereto concurring, That the

PLAINTIFF'S EXHIBIT 12

Duplicate of Exempt Real Estate, Hamilton County, Ohio, 1917, Sycamore Township

	Proprietors	Range	Town	Sec. or No. of Orig. Entry	Quar.	No. of Lot	Feet	Division, etc.	No. of Acres 1/100	Ward or School Dist.	Total Value Land Dollars	Total Value Buildings Dollars	Total Value Land and Buildings Dollars	Remarks and Marginal Taxes
1997	Moeller, Henry Archbishop	1	4	34	A½				152 95	10	16050	1550 1500	19100	Off 3.52 AC val. L 1000. The Commissioners of Hamilton Co., Ohio, transferred 2/17/21.
1020	Do	1	4	35	S½	1		Levi White E. of Canal	9 21	10	1230		1230	
1018	Do	1	4	35	Spt	2		Do	10	10	1350		1350	
1016	Do	1	4	35	Spt	3		Do	8 75	10	770		770	
1017	Do	1	4	35	S	4		Do	10	10	1350		1350	
1019	Do	1	4	35	S½	7		Do	10	10	1350		1350	
1021a	Do	1	4	35	Spt	2		Levi White W. of Canal	7 68	10	50		50	
1023	Do	1	4	35	S	3		Do	7 67	10	860		860	
1024	Do	1	4	35	S¼	4		Do	7 55	10	840		840	
1025	Do	1	4	35	S	5		Do	7 43	10	840		840	
1022	Do	1	4	35	S½	1		Do	6 14	10	830	670	1500	
	Do	1	4	35	SEpt	2	86.82x196.30 irr.	Do		10	10		10	

I hereby certify that the above is a true copy of the Exempt Duplicate of Hamilton County, Ohio.

E. S. Beaman, County Auditor,
By A. J. Roberts, Deputy.

PLAINTIFF'S EXHIBIT 13

Tax Duplicate, Hamilton County, Ohio, 1920, County Real Estate, Sycamore Township

Page	Proprietors	Range	Town	Sec.	Quar.	No. of Lot	Watercourse or Division	No. of Acres 1/100	Ward or School Dist.	Total Value Land Dollars	Total Value Buildings Dollars	Total Value Land and Buildings Dollars	Name of Street	Taxes Due December 20, 1920 Half-Tax 1920 Dollars Cents	Taxes Due December 20, 1920 Special Taxes	Taxes Due December 20, 1920 Special Taxes Dollars Cents	Taxes on June 20, 1921 Half-Tax 1920 Dollars Cents	Taxes on June 20, 1921 Special Taxes Dollars Cents
															R&M Rd.			R&M Rd.
26	Clawson, Mary Ellen	1	4	35	S½			3.	10	420	810	1230	Off Matthews Rd.	7.28	.0880	2.36	7.28	2.36
															R&M Rd.			R&M Rd.
59	Gorman, Howard	1	4	29	SW			40.66	10	4400	750	5150	Clark	30.49	.0882	28.47	30.49	28.47
															R&M Rd.			R&M Rd.
61	Gregory, Amelia E.	1	4	35	S½			2.50	10	350	460	810	E. S. Canal	4.80	.0883	1.70	4.80	1.70
							Levi White's								R&M Rd.			R&M Rd.
83	Jentz, Christian A.	1	4	35		6	Sub. W. of Canal		10	800	650	1450	Clark Rd.	8.58	.0885	9.71	8.58	9.71
															R&M Rd.			R&M Rd.
100	Lotz, Philomena	1	4	35	S½pt	3	L. White's Est.						Clark Rd.	7.70	.0886	10.79	7.70	10.79
	Do	1	4	35	S½pt	5	Do	9.27	10	1000	300	1300	Do	9.06	Do	11.29	9.06	Do 11.29
							Levi White								R&M Rd.			R&M Rd.
	Do	1	4	35	SE	6	E. of Canal	10.	10	1100	430	1530	Matthews	60.62	.0889	11.97	60.62	11.97
							Pt. of 117.84								R&M Rd.			R&M Rd.
106	Matthews, Marianna	1	4	35	N½		acre tract	9.	10	1590	8650	10240	Matthews	6.51	Do .0889	2.40	6.51	2.40
106	Matthews, Mortimer	1	4	35	SW			10.	10	1100		1100			Do .0890	3.70		Do 3.69
	Do	1	4	35	SW			40.	10	4400		4400	Do	26.05		1.81	26.05	Do 1.81
															R&M Rd.			R&M Rd.
	Do	1	4	35	N½			87.59	10	10790	9250	20040	Do	118.64	.0889	24.21	118.64	24.21
															R&M Rd.			
	Do	1	4	35	S½			59.78	10	5980	850	6830	Do	40.43	.0888	24.29	40.43	Do 24.29
															R&M Rd.			R&M Rd.
131	Rogan, Bessie E.	1	4	35		Pt 7	Morses Partn.	2.94	10	380	450	830	Wayne	4.91	.0895	.92	4.91	.92
															R&M Rd.			R&M Rd.
139	Shepherd, William F.	1	4	35		Pt 7	Morses Partn.	10.59	Glen	1780	1200	2980	Wayne	22.62	.0897	4.79	22.62	4.79
	& William F., Jr.	1	4	35		Pt 8	Do	11.59	Glen	1950	200	2150	Do	16.32	Do	5.74	16.32	Do 5.74
															R&M Rd.			R&M Rd.
133	Sauerland, Anna	1	4	35		Pt 8	Morses Partn.	1.74	10	160	580	740	Matthews	4.38	.0896	1.39	4.38	1.39
															R&M Rd.			R&M Rd.
161	Veddern, Henry	1	4	35	S½			29.70	10	3700	1100	4800	Milford Rd.	28.42	.0902	14.12	28.42	14.12
	Do	1	4	35	S½			.36	10	60		60	Do	.36	Do .0903	1.71	.36	Do 1.70
															R&M Rd.			R&M Rd.
167	White, Ella	1	4	35	S½	7	W. of Canal	7.20	10	800		800	Clark	4.74	.0903	8.44	4.74	8.44

I hereby certify that the above is a true copy of the Real property in the above names on the Real Estate Tax Duplicate of Sycamore Township, Hamilton County, Ohio, for the year 1920.

E. S. Beaman, Auditor of Hamilton County, Ohio,
By John B. Clark, Deputy, Cincinnati, Hamilton County, Ohio, February 28, 1922.

Clerk of the Board be and he hereby is directed to certify the assessment for the Glendale-Milford Road Improvement, I. C. H. 46, Sec-
[fol. 223] tion X, to the County Auditor, and to be by him placed upon the lists of the County of Hamilton, Ohio, for collection, no valid protest against said assessment having been made.

Adopted at a regularly adjourned meeting of the Board of County Commissioners of Hamilton County, Ohio, this 9th day of July, 1920.

Bauer, aye. Daly, aye. Mittendorf, aye.

Glendale-Milford Road, I. C. H. No. 46, Section "X"

Certificate of the clerk of the Board of County Commissioners of Hamilton County, Ohio, certifying assessments of the Glendale-Milford Road, also known as Intercounty Highway No. 46, Section "X," to the County Auditor.

Cincinnati, Ohio, July 9, 1920.

To the Auditor of Hamilton County: The assessments upon land and lots abutting the Glendale-Milford Road, Section "X", and lying within one-half mile on either side of the proposed improvement thereof, beginning at the Carthage-Hamilton Road, I. C. H. No. 43, thence along the line of the Glendale-Milford Road, I. C. H. No. 46, in Springfield and Sycamore Townships, a distance of 15,572 feet, or 2.570 miles, is hereby certified to you as such auditor, to be placed upon the tax lists of this county against the property therein designated and to be collected according to law in twenty semi-annual instalments with interest at six per cent. per annum, to be added to all unpaid instalments, in case the Board of County
[fol. 224-234] Commissioners of Hamilton County, Ohio, shall borrow money as provided by law for the making of such improvement.

Albert Reinhardt, Clerk of Board of County Commissioners of Hamilton County, Ohio.

Following receipt was presented:

Cincinnati, Ohio, July 9, 1920.

Received of Albert Reinhardt, Clerk of the Board of County Commissioners of Hamilton County, Ohio, estimated assessments on Glendale-Milford Road, Intercounty Highway No. 46, Section X, together with the copies of legislation passed by the Board of County Commissioners of Hamilton County, Ohio, in connection therewith.

E. S. Beaman, County Auditor, by M. L. Campbell, Jr., Deputy.

And Mr. Bauer moved that the same be ordered received and filed.

Bauer, aye. Daly, aye. Mittendorf, aye.

[Pages 24, 25, 26, 27, 28, Bond Reso.]

(Here follow Plaintiff's Exhibits 12, 13, 9, 10, and 1, marked side folio pages 235, 236, 237, 238, and 239)

[fol. 240] IN THE SUPREME COURT OF THE UNITED STATES

No. 834, October Term, 1923

MARIANNA MATTHEWS, Plaintiff-in-Error,

vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio, Defendant-in-Error

No. 835, October Term, 1923

MORTIMER MATTHEWS, Plaintiff-in-Error,

vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio, Defendant-in-Error

STIPULATION TO CONSOLIDATE AND AS TO PRINTING—Filed March 3, 1924

Cincinnati, Ohio, February 28, 1924.

The undersigned counsel for the respective parties in these two causes hereby stipulate that the two causes shall be submitted upon the same arguments and printed Briefs; that in the printing of the record in the case wherein Mortimer Matthews is plaintiff, the opinion of the Court below and the Bill of Exceptions and Exhibits attached thereto, beginning at page 36 of the printed record attached to the record, shall be omitted; and that in printing the record in the case wherein Marianna Matthews is plaintiff, Exhibits 1; 9; and 10; shall be reproduced in a reduced form approximate in size to Exhibits 12; and 13, thereto attached.

Mortimer Matthews, Counsel for the Plaintiffs-in-Error.
Chas. S. Bell, Pros. Atty., and Chester S. Durr, Ass't Pros. Atty., Counsel for Defendant-in-Error.

[fol. 241] [File endorsement omitted.]

Endorsed on cover: File No. 30,144. Ohio Court of Appeals, First Judicial District. Town No. 297. Marianna Matthews, plaintiff in error, vs. Louis J. Huwe, as treasurer of Hamilton County, Ohio. Filed February 23rd, 1924. File No. 30,144.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 40

MORTIMER MATTHEWS, PLAINTIFF IN ERROR,

vs.

LOUIS J. HUWE, AS TREASURER OF HAMILTON COUNTY, OHIO

IN ERROR TO THE COURT OF APPEALS FOR THE FIRST JUDICIAL DISTRICT OF THE STATE OF OHIO

FILED FEBRUARY 28, 1935

(30,145)

(30,145)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 298

MORTIMER MATTHEWS, PLAINTIFF IN ERROR,

vs.

LOUIS J. HUWE, AS TREASURER OF HAMILTON COUNTY, OHIO

IN ERROR TO THE COURT OF APPEALS FOR THE FIRST JUDICIAL DISTRICT OF THE STATE OF OHIO

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 15, 1924

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[fol. 1] **IN COURT OF APPEALS OF THE FIRST JUDICIAL DISTRICT OF OHIO, HAMILTON COUNTY, OHIO**

RETURN TO WRIT OF ERROR

In obedience to the commands of the within writ I, herewith, transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals of the First Judicial District of Ohio, Hamilton County, Ohio, in the city of Cincinnati, this fourteenth day of February, A. D., 1924.

Geo. W. Tibbles, Clerk of the Court of Appeals of the First Judicial District of Ohio, Hamilton County, Ohio, by Albert Swing, Deputy Clerk. (Seal of the Court of Appeals, First Appellate District, Ohio.)

[fol. 2] [File endorsement omitted]

IN COURT OF APPEALS OF THE FIRST JUDICIAL DISTRICT OF OHIO, HAMILTON COUNTY, OHIO

No. 2010

MARIANNA MATTHEWS, Plaintiff,

vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio, Defendant

PETITION FOR AND ORDER ALLOWING WRIT OF ERROR—Filed Jan. 24, 1924

Now comes Mortimer Matthews, plaintiff, and alleges that he brought this suit in the Court of Common Pleas, to enjoin said defendant from collecting certain assessments, upon the same, alleged constitutional grounds, as hereinafter set forth, and others, and that, upon the trial de novo of this cause, upon appeal in this court, final judgment was rendered in favor of the plaintiff enjoining only such interest upon the deferred payments of said assessments as was in excess of six (6%) per cent, but holding as against the plaintiff that the County Commissioners of Hamilton County, Ohio, were authorized to levy said assessments upon the property in question; that their proceedings were had in conformity to law; and that the assessments, except said excess interest, were valid; and that the plaintiff was not entitled to the further injunction for which he prayed.

The Plaintiff further alleges that said judgment was rendered on the 25th day of April 1923; and that on the 24th day of May 1923, he brought, as of right, in the Supreme Court of Ohio, pro-
[fol. 3] ceedings in error thereto, upon the same alleged constitutional grounds, as hereinafter set forth, and others; and that on the fourth day of December, 1923, his said proceedings in error were dismissed by the Supreme Court of Ohio upon the sole ground, that the said alleged grounds were not debatable Constitutional questions, and that consequently it did not have jurisdiction to hear said cause. The said judgment of this Court, being therefore that of the highest Court of law or equity in the state of Ohio, having jurisdiction thereof, has held and adjudged, that the levy of said assessments by said County Commissioners, by their resolution and proceedings, upon the plaintiff's real estate, under that part of the Act of the General Assembly of the state of Ohio, 106 Ohio Laws 574 (637), Sec. 207, and amended 107 Ohio Laws 69 (129), which is now section 1214 of the General Code of the state of Ohio, is not, and that said section itself, as so construed by said holding and judgment of this Court, is not, in violation of, and repugnant to, the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

In said ruling and judgment said Court of Appeals erred to the prejudice of the plaintiff, all of which appears in the record, opinion and final judgment of said Court of Appeals, described as aforesaid, and remanding this cause to said Court of Common Pleas to carry the same into execution.

[fol. 4] Wherefore your petitioner prays for an allowance of a Writ of Error from the Supreme Court of the United States to the Court of Appeals of the First Judicial District of Ohio, Hamilton County, Ohio, and the judges thereof, to the end that the record in this case may be removed into the Supreme Court of the United States, and the errors complained of by your petitioner may be examined and corrected, and said judgment modified, and said cause remanded for further proceedings; and your petitioner will ever pray.

Mortimer Matthews, Plaintiff—In His Own Person.

The Writ of Error as prayed for in the foregoing petition is hereby allowed this 24th day of January, 1924, the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of Two Hundred ($200.00) Dollars.

Dated at the City of Cincinnati, Ohio, this 24th day of January, 1924.

Wade Cushing, Presiding Judge of the Court of Appeals of the First Judicial District of the State of Ohio.

[fol. 5] [File endorsement omitted]

IN COURT OF APPEALS

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Jan. 24, 1924

Now comes the plaintiff, in connection with the petition for a writ of error herein, and respectfully submits that in the record, proceedings, decision and final judgment, of the Court of Appeals of the First Judicial District of the State of Ohio, Hamilton County, Ohio, in the above entitled action there is manifest error in this to-wit:

The Court of Appeals of the First Judicial District of the State of Ohio, Hamilton County, Ohio, erred, in that it rendered judgment for the plaintiff, enjoining certain excess interest only, upon deferred payments of the assessments complained of, and in that it refused to render judgment for the plaintiff, enjoining the entire amount of said assessments, as being repugnant to, and in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States, which declares that no state shall deprive any person of prop-
[fol. 6] erty without due process of laws.

Said error consisted in so construing that part of the Act of the General Assembly of the State of Ohio, 106 Ohio Laws 574 (637), Sec. 207, and amended 107 Ohio Laws 69 (129), now section 1214 of the General Code of the state of Ohio, which required the County Commissioners of Hamilton County to levy the assessments complained of, upon an apportionment, according to the benefits accruing to the lands assessed within one-half mile of either side of the improvement, as to hold, that the said County Commissioners were authorized to levy said assessments, that their proceedings were had in conformity to law, and that said assessments were valid, notwithstanding the fact, that said County Commissioners, ostensibly proceeding to make or direct an apportionment according to benefits, nevertheless actually directed the plainly arbitrary division of the amount to be assessed into three equal parts, one of which they assessed against all the property abutting upon the improvement in proportion to the number of front feet contained in each part, parcel, tract and lot abutting thereon, another, upon all the property within one-half mile of both sides thereof in proportion to its acreage or area, and the third upon all the said property in proportion to the tax valuation of each part, parcel, tract, and lot involved, (including the tax valuation of building thereon) as the same appears on the tax duplicate of Hamilton County.

Said repugnancy and conflict consist in the following particulars:

First. The plaintiff's lands, which were assessed, lie and abut upon a county road approximately parallel with the improvement, throughout the entire length of both, and lie, in a direct line, within one-half mile of, but do not abut upon the improvement, nor upon

any connecting road, within one-half mile by such road, whereas other assessed lands, not abutting upon the improvement, nor upon [fol. 7] said parallel county road, abut upon other connecting roads at a very much shorter distance from said improvement, or have access thereto, over other abutting lands of the same owner, at very much shorter distances. As the apportionment above described omitted to take into account either the factor of direct distance, or that of distance of access, which are those, without which no valuation of relative benefits could have been made, as between the plaintiff's lands and said other assessed lands not abutting upon the improvement, but lying much nearer and having much nearer access thereto, said assessments and their justification under said section 1214, result in the deprivation of the plaintiff of his property without due process of law.

Second. Some of the plaintiff's property, more distant, as it is, than other non-abutting and also abutting property, was of higher tax valuation, and had upon it buildings of much greater tax valuation than some of either of the latter. It was upon a wrong and plainly arbitrary principle, and a deprivation of the plaintiff of his property without due process of law, to include, as a factor in the valuation of relative benefits, in a definite inflexible ratio, either the value of bare land, or buildings, without reference to distance, whether direct, or by means of access, or the value of buildings, at all, as a part of the value of lands.

[fol. 8] Third. All of the plaintiff's property abutting, as it did and does, upon a County Road approximately parallel to the improvement throughout the entire length of both, had and has no need of the improvement as a means of access. As the value of the plaintiff's land depends wholly upon its own direct means of access thereto, it owes none of its value to the road for the improvement of which it has been assessed, and has received therefrom, no particular or special benefit, to any extent whatsoever, within the meaning of such, as under Section 1 of the Fourteenth Amendment to the Constitution of the United States, local assessments may be levied; between which and common or general benefits, there is a wide distinction, the same for the assessment of special benefits as for damages. The assessment of plaintiff's lands, in any sum whatsoever, and the justification thereof under said section 1214, results in the deprivation of the plaintiff of his property without due process of law, within the meaning of the terms of said Constitutional provision.

Mortimer Matthews, Plaintiff, in His Own Person

[fol. 9] [File endorsement omitted]

IN COURT OF APPEALS

[Title omitted]

WRIT OF ERROR—Filed Jan. 24, 1924

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges of the Court of Appeals of the First Judicial District of the State of Ohio, Hamilton County, Ohio:

Because in the record and proceedings, as also in the rendition of the Judgment, of a plea which is in the said Court of Appeals of the First Judicial District of the State of Ohio, Hamilton County, Ohio, before you or some of you, being the highest Court of law or Equity of said state in which decision could be had in the said suit between Mortimer Matthews and Louis J. Huwe, as Treasurer of Hamilton County, Ohio, wherein was drawn in question the validity of a statute of said state on the ground of its being repugnant to the provisions of the Constitution of The United States and the Amendments thereto and said decision was in favor of such, its validity, a manifest error hath happened, to the great damage of said Mortimer Matthews as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in their behalf, [fol. 10] do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same at Washington on the 23rd day of Feb., 1924, in the said Supreme Court of the United States, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of The United States may cause further to be done therein, to correct that error, what of right and according to the laws and customs of The United States should be done.

Witness the Honorable Wm. Howard Taft, Chief Justice of the Supreme Court of the United States, the 24th day of January, in the year of our Lord 1924.

B. E. Dilley, Clerk of the United States District Court in the Southern District of Ohio, Western Division, by Harry F. Rabe, Deputy. (Seal of the United States District Court, Southern District of Ohio.)

Allowed by Wade Cushing, Presiding Judge of the Court of Appeals of the First Judicial District of the State of Ohio, Hamilton County, Ohio.

[fol. 11] CITATION—In usual form, showing service on Chas. J. Bell et al.; filed Jan. 28, 1924; omitted in printing

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[fols. 12-20] [File endorsement omitted]

IN COURT OF APPEALS

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD—Filed Jan. 28, 1924

Cincinnati, Ohio, January 28th, 1924.

The undersigned Counsel for the respective parties in this cause hereby stipulate that the Clerk of the Court, shall make a transcript of, shall certify and transmit the entire Record in this cause, together with all pleadings and papers filed in this Court, except such as were filed prior to the amended and supplemental petition, and except the testimony of the following witnesses contained in the Bill of Exceptions, to-wit: the cross-examination of J. A. Stewart, the testimony of H. D. Hooge, the cross-examination of Marianna Matthews, the testimony of H. Earl Johnston, and the testimony of W. E. Maddux, and except Plaintiff's Exhibit 7, and all that part of Plaintiff's Exhibit 11 beginning "Commissioners' Letter File," on page 200 to the end of said Exhibit 11, page 210 of the printed record in the Supreme Court of Ohio.

Mortimer Matthews, Plaintiff. Chas J. Bell, Pros. Atty. Hamilton County, Ohio, Chester J. Durr, Asst. Pros. Atty. Hamilton County, Ohio, Attorneys for Defendant.

[fol. 21] IN COURT OF APPEALS

[Title omitted]

DOCKET AND JOURNAL ENTRIES

June 18, 1923.—Certified copy from Supreme Court filed.

June 21 (Jan. Term).—Minute 174, Certified copy of entry of Supreme Court granting motion for stay of execution.

Upon motion of plaintiff in error herein it is ordered that execution of the judgment of the Court of Appeals of Hamilton County, Ohio, in cause No. 2010 on the docket of said court, wherein Mortimer Matthews is plaintiff, and Louis J. Huwe, as Treasurer of Hamilton County, Ohio, is defendant, and the collection of the assessments therein litigated, be stayed, until the final hearing of the case in this Court upon the plaintiff in error, Mortimer Matthews, giving bond to the defendant in error, said bond to be executed, on the part of the plaintiff in error with sufficient surety

in the sum of $200.00 to the satisfaction and approval of the Clerk of Courts of Hamilton County, Ohio, conditioned that plaintiff in error will prosecute his petition in error to effect, and will abide and perform the judgment of this Court and pay all damages, penalties and costs that may be awarded against him in this case.

I, Seba H. Miller, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the records of said Court, to-wit: from Journal No. 29, Page —.

In witness whereof, I have hereunto subscribed my name and [fol. 22] affixed the seal of said Supreme Court this 19th day of June, A. D. 1923.

Seba H. Miller, Clerk, by L. J. Corcoran, Deputy. (Seal.)

1923, Dec. 27 (Nov. Term).—Minute 52 Certified copy from Supreme Court dismissing petition in error at the costs of plaintiff in error.

This cause came on to be heard upon the transcript of the record of the Court of Appeals of Hamilton County, and it appearing to the Court that this cause was filed as of right and that the record presents no debatable constitutional question, it is ordered that the petition in error be, and the same hereby is dismissed.

It is further ordered that defendant in error recover from the plaintiff in error his costs herein expended, taxed at $—.

I, Seba H. Miller, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the records of said Court, to-wit: from Journal 29 page 587.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 11th day of December, A. D. 1923.

Seba H. Miller, Clerk, by L. J. Corcoran, Deputy. (Seal.)

1924, Jan. 24.—Petition for writ of errors from the Supreme Court of the United States to the Court of Appeals of the First Judicial District of Ohio, Hamilton County, Ohio.

Jan. 24.—Assignment of errors on writ of error from the Supreme Court of the United States to the Court of Appeals of the First Judicial District of the State of Ohio, Hamilton County, Ohio, filed.

Jan. 24.—Writ of error from the Supreme Court of the United States to the Court of Appeals of the First Judicial District of the State of Ohio, Hamilton County, Ohio, filed.

[fol. 23] Jan. 24 (Jan. Term).—Minute 27, Entry allowing writ of error.

The above entitled cause coming on to be heard upon the petition of the Plaintiff therein for a writ of error from the Supreme Court of the United States to the Court of Appeals of the First Judicial District of the State of Ohio, Hamilton County, Ohio, and upon the examination of said petition and the record in said case, and desiring to give the petitioner an opportunity to present to the

Supreme Court of the United States the questions presented by the record in said case.

It is ordered that a Writ of Error be and the same is hereby allowed to this Court from the Supreme Court of The United States and that the bond presented by said petitioner be and the same is hereby approved.

Wade Cushing, Presiding Judge.

Cincinnati, Ohio, January 24th, 1924.

1924, Jan. 25.—Bond 111 in General Bond Book 12 in $200.00 given.

Jan. 25.—Two copies of Writ of Error filed.

Jan. 28.—Citation filed.

Jan. 28.—Stipulation as to Transcript of record filed.

Feb. 7 (Jan. Term).—Minute 37, Entry substituting Ferd J. Bader, Treasurer.

Now comes the plaintiff in this cause and suggests to the Court that after judgment in this cause in this Court, the term of office of the said Louis J. Huewe, as Treasurer of Hamilton County, Ohio, defendant expired, and his successor, Ferdinand Bader, having been elected, was qualified and inducted into office as Treasurer of Hamilton County, Ohio.

Now, therefore, in consideration of the premises and with the consent of Counsel of Record for both parties hereto, the Court directs and orders that said Ferdinand Bader, as such Treasurer, be substituted as defendant for said Louis J. Huwe, as Treasurer and that the said Judgment stand as against the said Ferdinand Bader, as [fol. 24] Treasurer, as aforesaid, and be in all respects as against him as such Treasurer; and be enforced against said Ferdinand Bader, as Treasurer, as aforesaid, in accordance with the statutes in such case made and provided.

Mortimer Matthews, Attorney for Plaintiff.

We consent for Ferdinand Bader, as Treasurer of Hamilton County, Ohio.

Chas. S. Bell, Chester S. Durr, Attorneys for Defendant.

[fol. 25] Bond on Writ of Error for $200—Approved and filed Jan. 25, 1924; omitted in printing

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[fol. 26] In Court of Appeals

Certificate of Lodgment

I, George W. Tibbles, Clerk of said Court, do hereby certify that there was lodged with me as said Clerk on January 25, 1924, in the case of Mortimer Matthews, plaintiff, against Louis J. Huwe, as Treasurer of Hamilton County, Ohio, defendant—

(1) The original bond a copy of which is herein set forth.

(2) Two copies of the Writ of Error as herein set forth, one for the defendant, and one to file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court in Cincinnati, Hamilton County, Ohio, this fourteenth day of February, A. D., 1924.

Geo. W. Tibbles, Clerk of the Court of Appeals of the First Judicial District of Ohio, Hamilton County, Ohio, by Albert Swing, Deputy Clerk. (Seal of the Court of Appeals, First Appellate District of Ohio.)

[fol. 27] IN COURT OF APPEALS

[Title omitted]

CLERK'S CERTIFICATE

I, George W. Tibbles, Clerk of the Court of Appeals of the First Judicial District of Ohio, Hamilton County, Ohio, do, hereby certify that the foregoing petition for Writ of Error, Assignment of Errors, Order Allowing Writ of Error, Writ of Error, Citation to Defendant and His Entry of Appearance, and Stipulation as to Transcript of Record are the original papers filed in this Court in the above entitled cause; that the copy of the bond hereto attached is a true copy of the bond filed in said cause; that the (printed) copy of the record attached hereto beginning at the middle of page five thereof is a true copy of the printed record filed in said cause, (the parts erased therefrom on pages 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 178, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, and 210 being so erased in accordance with the stipulation as to tran- [fols. 28-32] script of record); that plaintiff's Exhibits 1, 9, and 10 attached are true copies of said Exhibits as attached to the Bill of Exceptions in this cause, that the transcript of Docket and Journal Entries as contained in said printed record and that the foregoing additional transcript of Docket and Journal Entries attached are truly taken and correctly copied from the records of this Court; and that the opinion attached hereto was rendered by the Court in said cause.

In witness whereof I have hereunto subscribed my name and affixed the seal of said Court of Appeals of the First Judicial District of Ohio, Hamilton County, Ohio, this 14th day of February, A. D., 1924.

Geo. W. Tibbles, Clerk of the Court of Appeals of the First Judicial District of Ohio, Hamilton County, Ohio, by Albert Swing, Deputy. (Seal of the Court of Appeals, First Appellate District of Ohio.)

Clerk's fee for add. transcript in Court of Appeals, $1.75; paid by Mortimer Matthews.

[fol. 33] COURT OF APPEALS, FIRST APPELLATE DISTRICT OF OHIO

MORTIMER MATTHEWS, Plaintiff,

vs.

LOUIS J. HUWE, Treasurer, etc., Defendant.

TRANSCRIPT AND ORIGINAL PAPERS ON APPEAL—Filed April 5, 1922

[fol. 34] IN COURT OF COMMON PLEAS, HAMILTON COUNTY, OHIO

MINUTE ENTRIES

Petition filed January 17, 1921. Action for injunction and other relief.

1921, Jan. 17th (Jan. Term).—Minute 3039. Temporary restraining order allowed. Bond, $200.00. Let temporary restraining order issue as prayed for. Bond in the sum of two hundred dollars ($200.00) to the satisfaction of the clerk.

Jan. 17th.—Bond, 184 in Bond Book 22, in $200.00 given (see safe).

Jan. 17th.—Summons issued. Indorsed: Injunction allowed. Bond $200.00 given. Fred E. Wesselman, clerk, by Albert Swing, deputy.

Jan. 17th.—Motion for temporary restraining order filed.

Jan. 24th.—Summons returned indorsed: Received. Ferd Bader, Sheriff Hamilton County, Ohio. Jan. 17th, 3.42 p. m., 1921.

Cincinnati, January 18, 1921.

Served the within named defendant, Louis J. Huwe, as Treasurer of Hamilton County, Ohio, by delivering to him personally a true copy of this writ with all the indorsements thereon.

Ferd Bader. Sheriff Hamilton County, Ohio, by Ray D. Podesta, Deputy.

Sheriff fees, 91 cents.

[fol. 35] Jan. 28th.—Demurrer of defendant filed.

Feb. 7th.—Motion to withdraw demurrer filed.

Feb. 7th (Jan. Term).—Minute 3136. Entry granting leave to withdraw demurrer and granting defendant additional time in which to plead.

This cause now coming on for hearing on the motion of Louis H. Capelle, Prosecuting Attorney of Hamilton County, acting by and for the defendant herein, the court on consideration thereof grants the right to withdraw the demurrer heretofore filed herein

and grants said defendant the right to answer herein on or before the 26th day of February, 1921.

1921, Mar. 5th (Jan. Term).—Minute 3233. Leave given defendant to file motion for an extension of time in which to answer.

Mar. 5th.—Motion filed.

Mar. 5th (Jan. Term).—Minute 3233. Entry granting an extension of time in which to answer.

This cause coming on for hearing on the motion of Louis H. Capelle, Prosecuting Attorney of Hamilton County, Ohio, acting by and for the defendant herein, the court on consideration thereof grants an extension of time in which to answer until the 29th day of March, 1921.

Mar. 7th.—Answer of defendant filed.

1922, Jan. 5th (Jan. Term).—Minute 3007. Leave given to file amended and supplemental petition.

Jan. 5th.—Amended and supplemental petition filed.

[fol. 36] Jan. 5th. (Jan. Term).—Minute 3007. Entry granting leave to file amended and supplemental petition.

On application of plaintiff leave is given to file his amended and supplemental petition and the same is filed accordingly.

Jan. 5th (Jan. Term).—Minute 3007. Temporary restraining order allowed. Bond $500.00.

Let temporary restraining order issue as prayed for. Bond in the sum of five hundred dollars to the satisfaction of the clerk.

Jan. 5th.—Bond 276 in Bond Book 22, in $500.00 for injunction given (see safe).

Jan. 5th.—Summons issued to January 16, 1922. Indorsed: Injunction allowed. Bond in $500.00 given. George W. Tibbles, clerk, by Albert Swing, deputy.

Jan. 7th.—Answer to amended petition filed.

Jan. 16th.—Summons returned indorsed: Received. Ferd Bader, Sheriff, Hamilton County, Ohio. Jan. 5th, 3:56 p. m., 1922.

Cincinnati, Jan. 6, 1922.

Served the within named defendant, Louis J. Huwe, as Treasurer of Hamilton County, Ohio, by delivering to him personally, a true copy of this writ with all the indorsements thereon.

Ferd Bader, Sheriff, Hamilton County, Ohio, by John Krieg, Deputy.

Sheriff fees, 91 cents.

[fol. 37] 1922, Feb. 20th (Jan. Term).—Minute 1406. Application for an official stenographer filed and allowed.

Mortimer Matthews, attorney for plaintiff and C. S. Durr, Assistant Prosecutor, attorney for defendant, request the services of an official stenographer to make a full report of the testimony and proceedings in this case.

(Signed) C. S. Durr, for Defendant. Mortimer Matthews, for Plaintiffs.

The above request for an official stenographer is granted and John C. Kiehborth is appointed to make a full report of the testimony and proceedings.

Feb. 20th (Jan. Term).—Minute 1408. Entry ordering the official stenographer to transcribe testimony.

For good cause shown the court of its own motion orders John C. Kiehborth, official stenographer, to make a transcript of the testimony in this case and the costs to be paid by warrant on the county treasurer and taxed and collected as other costs in this case and certificate for $30.24 issued for same.

Mar. 31st (Jan. Term).—Minute 1587. Entry dissolving temporary injunction at the costs of plaintiff. Plaintiff gives notice of appeal. Appeal bond, $200.00.

This cause coming on to be heard this day on the pleadings, the evidence and arguments of counsel, and the court being fully ad-
[fol. 38] vised finds for the defendant.

Wherefore it is ordered, adjudged and decreed that the temporary restraining order heretofore issued be dissolved, the prayer for an injunction be refused, the action dismissed, and the defendant recover from the plaintiff his costs herein expended.

The plaintiff having given notice of his intention to appeal the court fixes the appeal bond in the sum of $200.00.

1922, Apr. 3d.—Bond, 7 in Bond Book 25, in $200.00 for appeal given (see safe).

Clerk's certificate to foregoing paper omitted in printing.

[fol. 39] IN COMMON PLEAS COURT

AMENDED AND SUPPLEMENTAL PETITION—Filed January 5, 1922

The plaintiff, Mortimer Matthews, says that he is, and has been, for many years, a citizen and resident of Hamilton County, in the State of Ohio, and that Louis J. Huwe, as Treasurer of Hamilton County, in the State of Ohio, defendant herein, was elected, and is now qualified and acting as such, and that the tax duplicate for the year 1921 is now in his hands as treasurer as aforesaid for the collection of taxes and assessments thereupon entered.

Plaintiff is, and was at all times mentioned in this petition, the owner in fee simple of certain tracts of land in Sycamore Township in Hamilton County, in the State of Ohio, and entered upon said duplicate as follows:

(1) A tract of land containing ten (10) acres — southwest quarter of Section 35, Township 4, Range 1. Said tract is thus entered upon said duplicate in plaintiff's name at a total value of eleven hundred ($1,100.00) dollars; and one-half (½) of the taxes assessed and levied thereon on said duplicate for the year nineteen hundred and

twenty-one, payable January 15, 1922, is $6.57 of which, however, the defendant will not accept payment unless plaintiff, also, pays three certain instalments of an assessment on part thereof, for the improvement of Section X, of the Glendale and Milford Road, being Intercounty Highway, No. 46, Section X, in the sum of $2.40 each, which, also, appear upon said duplicate as payable at the same time. [fol. 40] A part of said land, to-wit, five and ninety-six hundredths (5.96) acres thereof, is claimed by the County Commissioners of Hamilton County, Ohio, to lie within a half mile of said Section X, by direct line, but do not abut upon the same, and is the part, on which said assessment is levied. None of said land, however, lies within a half mile of said Section X by the nearest connecting public roads.

(2) A tract of land containing forty (40) acres in the southwest quarter of Section 35, Township 4, Range 1. Said tract is thus entered upon said duplicate in plaintiff's name at a total valuation of forty-four hundred ($4,400.00) dollars; and one-half (½) of the taxes assessed and levied thereon on said duplicate for the year nineteen hundred and twenty-one, payable January 15, 1922, is $26.27, of which, however, the defendant will not accept payment, unless plaintiff also pays three certain instalments of an assessment on part thereof for the same improvement as last above described, in the sum of $3.70 each, which, also, appear against the same on said duplicate as payable at the same time. A part of said forty (40) acres, to-wit, nine and seventy-six hundredths (9.76) thereof, is claimed by the County Commissioners of Hamilton County, Ohio, to lie within a half mile of said improvement, by direct line, but does not abut upon the same, and is the part, on which said assessment is levied. None of said tract, however, lies within a half mile of said Section X, by the nearest connecting public roads.

[fol. 41] (3) A tract of land containing eighty-seven and fifty-one hundredths (87.59) acres in the north one-half (½) of Section 35, Township 4, Range 1. Said tract is thus entered upon said duplicate in plaintiff's name, at a total value for said land, and the buildings and improvements thereon, of twenty thousand and forty ($20,040) dollars; and one-half (½) of the taxes assessed and levied thereon, on said duplicate, for the year nineteen hundred and twenty, payable January 15, 1922, is $119.64, of which, however, the defendant will not accept payment, unless plaintiff, also, pays three certain instalments of an assessment on part, thereof, for the same improvement, as aforesaid, in the sum of $24.21 each, which, also, appear upon said duplicate against the same as payable at the same time. A part of said land, to-wit, forty-four and seven hundredths (44.07) acres thereof, is claimed by the County Commissioners of Hamilton County, Ohio, to lie within a half mile of said improvement, by direct line, but does not abut upon the same, and is the part, on which said assessment is levied. None of said tract, however, lies within a half mile of said Section X by the nearest connecting public roads.

(4) A tract of land containing fifty-nine and seventy-eight hundredths (59.78) acres in the south one-half (½) of Section 35,

Township 4, Range 1. Said tract is thus entered upon said duplicate in plaintiff's name, at a total valuation for said land, and the buildings and improvements thereon, of six thousand eight hundred and thirty ($6,830) dollars, and one-half (½) of the taxes assessed [fol. 42] and levied thereon, on said duplicate for the year nineteen hundred and twenty-one, payable January 15, 1922, is $40.77, of which, however, the defendant will not accept payment, unless plaintiff, also, pays three certain instalments of an assessment thereon, for the same improvement as aforesaid, in the sum of $24.29 each, which, also, appear upon said duplicate against the same as payable at the same time. Said tract lies within half a mile of said improvement, by direct line, but does not abut upon the same; and said assessment is levied upon the whole tract, none of which, however, lies within a half mile of said Section X, by the nearest connecting public roads.

(5) The plaintiff is, also, assessed upon an additional forty-five hundredths (.45) of an acre claimed to be a part of said forty (40) acre tract above described. Two instalments of an assessment for the same, due, and payable on January 20, 1921, and June 20, 1921, are one and eighty-one hundredths ($1.81) dollars each. Said assessment, if properly entered, is for the same improvement, and the land upon which it is made, is claimed by the County Commissioners of Hamilton County, Ohio, to lie by direct line within half a mile of, but does not abut upon the same. Said assessment, however, is an error, and is not upon a portion of said forty (40) acre tract; but is a duplication of a part of the assessment made upon said forty-four and seven hundredths (44.07) acres above described, and is included in the same. None of said tract, lies within a half mile of said Section X, by the nearest connecting public roads.

[fol. 43] The County Commissioners of Hamilton County, Ohio, on April 13, 1920, adopted resolutions to the effect that the public interest demanded the improvement under the provisions of Sections 1178 to 1231-11, inclusive, of the General Code of Ohio of that part of Intercounty Highway No. 46, situated in the County of Hamilton, and described as beginning at the Carthage-Hamilton Road, Intercounty Highway No. 43, thence along the line of the Glendale-Milford Road, Intercounty Highway No. 46, to the Miami River, in Springfield, Sycamore and Symmes townships, in all, a distance of nine and one-tenth miles; and that they did thereby make application to the State Highway Commissioner for aid by the State of Ohio for said improvement and did thereby agree to pay one-half the preliminary expenses thereof, and immediately transmitted the same to the said Highway Commissioner, who on or about April 16, 1920, approved said application exactly as requested. Said approval was received by said County Commissioners and was ordered filed by them April 30, 1920.

Said action by said County Commissioners was upon their own initiative and without a petition therefor of any of the owners of the lineal feet abutting on said Intercounty Highway No. 46, including Section X thereof. The said application was for state aid in the

improvement, as distinguished from the construction, of said Intercounty Highway No. 46, which had, including said Section X, been already constructed, and was for all of the same that is situated in [fol. 44] Hamilton County, nine and one-tenth miles in length, as distinguished from any fractional part, or section thereof, such as Section X, only two and fifty-seven hundredths miles in length, as described in the subsequent proceedings, all of which expressly concern said Section X only, and its improvement as distinguished from its construction. Said County Commissioners did not adopt any resolution that the public interest demanded the improvement of said Section X only.

On May 11, 1920, said County Commissioners adopted resolutions, reciting said initial resolutions, application, agreement and approval, as hereinbefore alleged, and declaring it necessary to improve that part only of the Glendale-Milford Road, also known as Intercounty Highway No. 46, beginning at the point where Intercounty Highway No. 46 intersects Intercounty Highway No. 43, thence east along the route of Intercounty Highway No. 46 to the point where Intercounty Highway No. 46 intersects Intercounty Highway No. 19, being all in Springfield and Sycamore townships, Hamilton County, Ohio, and comprising a distance of only two and fifty-seven hundredths miles, designated and thereafter to be known as Section X of the Glendale-Milford Road, or Intercounty Highway No. 46.

Said resolutions further provided, that the County of Hamilton pay all the expenses and costs of the improvement over and above the amount contributed by the state, and over and above the amount to be raised by assessments to be levied on all property lying within one-half mile on both sides of the proposed improvement in accordance [fol. 45] to the benefits thereto, being that part of the entire cost of the improvement represented by ten per cent (10%) of the most expensive type of improvement contemplated in the plans, profits, specifications, and estimates, excepting therefrom the cost of bridges and culverts.

Said plans, profiles, specifications and estimates, included a change in a part of the line of said proposed improvement of said Section X from that followed by the existing highway, and thereby needlessly increased the total cost of the same about fifteen thousand dollars. By making such change it was not possible to eliminate dangerous curves, sharp angles or steep grades; nor was such change planned and specified with any such purpose in view. In adopting said most expensive type of improvement and in specifying said unnecessary change, said County Commissioners exceeded their jurisdiction, if any; and the same was an abuse of discretion.

Said resolutions of May 11, 1920, also, waived contribution from Springfield and Sycamore townships, in which said Section X is situated, of their share of the cost of improving said section, only, of said road, but did not add the same nor any part thereof, nor any of the county's share of said cost and expense to the amount to be assessed upon property owners, and provided that ten per cent only, and no more, of said total cost and expense, excepting therefrom the cost of bridges and culverts, should be assessed against the real estate

within one-half (½) mile of both sides of said section of said Inter-
[fol. 46] county Highway, whereas, under the law applicable thereto, the same could not be assessed, if at all, except upon property abutting upon the improvement.

Said resolutions, also, instead of providing that the assessment of said ten per cent only, of the total cost and expense of improving said section, excepting therefrom the cost of bridges and culverts, should be apportioned by the County Surveyor, upon his own judgment, according to the benefits accruing to the land located within one-half (½) mile, as aforesaid, actually and expressly directed the arbitrary division of the same into three (3) equal parts, one of which parts, or three and one-third per cent of the total cost of said improvement, should be assessed against the property abutting upon said Section X in proportion to the number of front feet contained in each part, parcel, tract, and lot, abutting upon said Section X; and that the second part thereof, or three and one-third per cent of the total cost of said improvement, should be assessed against all the property within one-half (½) mile of both sides of said Section X, in the proportion to the acreage or area thereof; and finally, that the remaining one-third (⅓) of the same, or three and one-third per cent of the total cost of said improvement should be assessed against all of the property within one-half (½) mile of both sides of said Section X in proportion to the tax valuation of each part, parcel, tract, and lot involved, as the same appears on the tax duplicate of said county.

On the same day, May 11, 1920, said County Commissioners, by [fol. 47] unanimous vote, adopted resolutions purporting to notify said property owners, in manner and form more fully hereinafter described, and providing for the publication of said resolutions, and for the presentation and hearing of claims for compensation.

Thereafter, on May 28, 1920, said County Commissioners, by unanimous vote, adopted resolutions determining to proceed with the improvement, of said section only of said Intercounty Highway. Said resolutions, instead of requiring the County Surveyor of Hamilton County, Ohio, to make a tentative apportionment of the amount to be paid by the owners of abutting property only; and instead of directing him to make the same, upon his own independent judgment, according to the benefits accruing to the land to be assessed, expressly directed him to make, by actual view, an estimated assessment upon the lands within one-half (½) mile, as aforesaid, in accordance with the arbitrary resolution theretofore unanimously dopted by the Board of County Commissioners, to-wit, the resolutions of May 11, 1920, as above described.

Thereafter, on June 22, 1920, said County Commissioners, by Unanimous vote, adopted a resolution, reciting that the County Surveyor had filed an estimated assessment against the property lying within one-half (½) mile of either side of said Section X only, and had proportioned the total amount to be raised by assessing said property in accordance with the arbitrary plan theretofore adopted by said Board of County Commissioners. Said resolution thereupon proceeded to assess ten (10) per centum only and no more, of the [fol. 48] entire cost and expense of said improvement, being the

sum of $15,607.15, against the so-called "abutting property owners" lying within one-half (½) mile of both sides of said Section X of said Intercounty Highway, according to the arbitrary plan previously adopted on May 11, 1920, as above described.

Said assessment was not apportioned according to the benefits accruing to the land so located. The use of the word, "abutting" in said resolution was a misrepresentation of fact, and an attempt at an evasion of the law.

Said resolution of June 22, 1920, also provided for the advertisement of said assessment, without describing the lands lying within one-half (½) mile on both sides of said Intercounty Highway, Section X except as such, and without naming the several owners thereof, to many of whom, including the plaintiff, the name, number and section of said Intercounty Highway, having been but recently given, were unknown. The publication of said resolution was made accordingly, and was evasive of the law and altogether inadequate for the due notification of said property owners, including the plaintiff. The aforesaid resolution of May 11, 1920, purporting to notify property owners, and the publication thereof, were defective, evasive and inadequate in the same manner for the same reasons, and to the same extent. The plaintiff had no actual knowledge or notice of any of the proceedings alleged in this petition, or of said assessment, until after the first day of December, 1920.

Thereafter, on July 9, 1920, said Board of County Commissioners, [fol. 49] by unanimous vote, adopted a resolution confirming said assessments, and certifying the same to the Auditor of Hamilton County, Ohio, and providing that all unpaid assessments should be placed on a special duplicate, with interest added thereto, to be paid in twenty (20) equal instalments, one every six (6) months, beginning Dec. 20, 1920, during ten (10) years. Said resolution contained a recital that such apportionment was according to the benefits which will result in said real estate; but said recital was evasive of the law applicable thereto, and a misrepresentation of fact and of the mode and manner, in which said assessments had been levied, as hereinbefore described, and as appears upon the face of the proceedings.

Said resolution of July 9, 1920, made no provision for the payment of said assessments within a limited time without interest, at the option of the property owners; but ostensibly provided for said interest at the same rate, six (6) per cent, as that upon bonds to be issued and sold for the payment of the cost of said improvement, and that said assessments were for the payment of said bonds with interest. Said interest, nevertheless, as carried into said assessments and certified, is in fact, nearly twice as much as is necessary for such purpose and as is authorized by law and is usurious, and at the rate of ten and eight-tenths per cent.

Five and ninety-six hundredths (5.96) acres of plaintiff's ten (10) acre tract, first above described, have been assessed, as aforesaid, in the total sum of $47.89, of which $17.96 is interest, and of which the sum [fol. 50] of $2.40, is the first of twenty semi-annual payments entered by the Auditor of Hamilton County, Ohio, upon the special and

general duplicates as aforesaid. Since the filing of the original petition herein two further instalments have become due and are now payable unless enjoined.

Nine and seventy-six hundredths (9.76) acres of plaintiff's forty (40) acre tract, second above described, have been assessed, as aforesaid in the total sum of $73.81, of which $27.68 is interest, and of which the sum of $3.70 is the first of twenty semi-annual payments similarly entered, as above described. Since the filing of the original petition herein two further instalments have become due and are now payable unless enjoined.

Forty-four and seven hundredths (44.7) acres of plaintiff's eighty-seven and fifty-nine hundredths (87.59) acre tract, third above described, have been assessed as aforesaid in the total sum of $484.10 of which $181.54 is interest and of which the sum of $24.21 is the first of twenty (20) semi-annual payments similarly entered, as above described. Since the filing of the original petition herein two further instalments have become due and are now payable unless enjoined.

The whole of plaintiff's fifty-nine and seventy-eight hundredths (59.78) acre tract, fourth above described, has been assessed, as aforesaid, in the total sum of $485.73, of which the sum of $182.15 is interest, and of which the sum of $24.29 is the first of twenty (20) semi-annual payments, similarly entered, as above described. Since [fol. 51] the filing of the original petition herein two further instalments have become due and are now payable unless enjoined.

The whole of said forty-five hundredths (.45) of an acre, fifth above described, appears on said tax duplicate as a part of plaintiff's forty-four and seven hundredths, third above described. It has, however, been assessed in the total sum of $3.62, of which $1.36 is interest, and of which the sum of $1.81 is the first of two semi-annual payments otherwise similarly entered, as above described. Since the filing of the original petition herein the said second instalment has become due and is now payable unless enjoined.

Plaintiff has not paid any of said assessments or any instalments thereof. The work upon said improvement was not begun until long after the commencement of this suit, and the obtaining of a preliminary restraining order.

So much of plaintiff's said lands, first, second, third and fifth described, as are assessed as aforesaid, lie and abut upon the north side of a county road situated in a direct line less than one-half (½) mile north of said Intercounty Road No. 46, Section X; and plaintiff's land, fourth above described, on the south side of said county road. None of said lands can use said Section X except by first traversing from more than half a mile to a mile or more of connecting roads. Said county road approximately parallels said Intercounty Road No. 46, Section X, throughout its entire length, with the exception of converging in a southerly direction toward the [fol. 52] same near its eastern terminus in Intercounty Road No. 19, and with the further exception of about a quarter of a mile in its western half, during which it converges in a northerly direction, toward the village of Glendale. The result is that said parallel county road

is shorter by half a mile between Glendale and said Intercounty Road No. 19, at its intersection with said Section X, than is the route between said points over said Intercounty Road No. 46, Section X. Plaintiff's said lands are nearer Intercounty Highway No. 43 at the village of Glendale by the parallel county road, on which they abut than they are by the use of said Intercounty Road No. 46, Section X, by fully a mile; and nearer Intercounty Highway No. 19, at its intersection with said Section X, by half a mile. No special benefits whatsoever will accrue to plaintiff's said lands from the improvement of Intercounty Road No. 46, Section X, but on the contrary, the same is, and will be a detriment to said lands and to plaintiff, for the reason that said parallel county road, upon which his lands abut, also, needs improvement, and a large part of the land, upon which the cost and expenses thereof can be assessed, is already assessed for the improvement of Intercounty Road No. 46, Section X, which fact the County Surveyor, in making any future estimated assessment for the improvement of said parallel county road, may take into consideration, in apportioning such an assessment. Any future assessment, therefore, for the improvement of said parallel county road would have to fall to a greater extent than otherwise, upon plaintiff's abutting tracts and lands. Further- [fol. 53] more, any assessment therefor, under the law applicable thereto, would have to be without state aid, and in a much larger proportion of the total cost of the improvement, than in the case of said Intercounty Road No. 46, Section X. The improvement of said parallel county road will therefore be very much delayed, if not entirely prevented.

Said detriment falls with peculiar force on plaintiff and upon his said lands, because the same extend along said parallel county road on both sides thereof, for nearly a mile, and are, and can not but be, operated together as one farm, between the different parts of which there is, and must be, constant inter-communication, and yet plaintiff is not able to make full use of said parallel county road on account of a steep grade thereon, extending several hundred feet, about in the center of said farm. Plaintiff, accordingly, has been and is obliged to build, and maintain, at great expense, a private road of easier grade, in his own lands, to the north of said county road, so as to be able to haul normal loads to and from the different parts of his said farm.

Said detriment very much outweighs any special benefit that might be imagined for the lands abutting on said parallel county road, including especially, those of the plaintiff.

Said Board of County Commissioners, in planning, directing, confirming, and assessing one-third (1/3) of said amount to be assessed according to value, as above described, included therein, not only the value of the land itself as valued for taxation, but, also, that of [fol. 54] the buildings and improvements thereon, as separately appraised and separately carried out, upon the tax duplicate. In so doing, it so clearly failed to assess according to benefits, some of the land which does not abut upon said Intercounty Road No. 46, Section X, but does abut upon said parallel county road including the

third described 44.07 acres and the fourth described 59.78 acres of the plaintiff, that the aggregate assessment upon one of the latter is actually greater than that upon equal areas of some of the lands abutting upon said Intercounty Road, Section X. Furthermore, to direct the inclusion of the value of buildings and improvements as a necessary part of an assessment according to benefits was wholly unauthorized by law.

Upon said 87.59 acre tract, of which said 44.07 acres assessed, is a part, plaintiff is taxed upon said duplicate on valuations for the land alone of $10,790.00, and for the buildings and improvements thereon of $9,250.00, making a total of $20,040.00 Said 44.07 acres are a little more than half of said 87.59 acres. Said assessment according to value thereon, was based upon the same ratio, a little more than half of said total valuation for land and buildings, that is, on $10,080.00. This was done upon the assumption, that plaintiff's buildings and improvements are equally distributed between said 44.07 acres assessed and the remainder of the tract, which is not the case. Considerably more than one-half thereof, and more than three-fourths even, in value, are situated on the said remainder of said tract, and more than half a mile in a direct line from said Sec-
[fol. 55] tion X, but are included, nevertheless, in said assessment, and totally without authority of law.

Said Board of County Commissioners, in initiating and continuing said proceedings, without a petition; in adopting a resolution that the public interest demanded the improvement of the whole of Intercounty Highway No. 46, and proceedings thereupon to improve Section X only thereof; in the abuse of discretion, above described; in assessing plaintiff's land not abutting upon the improvement, but upon a parallel county road, and not lying within a half mile thereof by the nearest connecting public roads; and not benefited thereby; and upon an arbitrary plan which was not according to benefits accruing to the same; and in instructing the County Surveyor, as it did, instead of merely causing him to make a tentative apportionment according to benefits; and without adequate notice to, or actual knowledge of plaintiff; and in including the value of buildings and improvements in its assessment; and in including therein the values of some of the same not situated in a direct line within half a mile of said improvement; and in the deprivation of said option; and in said usurious overcharge of interest; all as above described; and in assessing any part at all of the cost of an improvement of an Intercounty Highway upon lands supposed to be specially benefited thereby; acted in each and every one of said specifications without jurisdiction or authority, and all of said assessments on plaintiff's said property are illegal and void.

[fol. 56] If said assessments are enforced, plaintiff will be deprived of his property for public use, without compensation and so far as abutting property owners may have been relieved from assessment, for private use, and without due process of law, in violation of his rights as the owner thereof, and in violation of Article 1, Section 19, of the constitution of the State of Ohio and of the fourteenth amendment to the constitution of the United States

of America. If such inadequate notice and publication as was made and is alleged, and if such deprivation of said option and such overcharge of interest, as is alleged, are justified by the meaning of the sections of the General Code, applicable thereto, said sections are also in violation of the same constitutional provisions, including also that which secures to him the equal protection of the laws. And finally the provisions of the General Code requiring at all events the assessment upon property owners of ten per cent. of the cost of the improvement of Intercounty Highways are in violation of Article 1, Section 19 of the constitution of the State of Ohio.

Said assessments, as they appear upon the special duplicate in the office of the Auditor of Hamilton County Ohio, and the first four instalments thereof, as they appear upon the general duplicate of said county, now in the hands of the defendant for collection, are a charge and lien upon plaintiff's said real estate, with all the powers given defendant by law for distraint and sale in the case of delinquent taxes, and with all the penalties thereunto attached. Unless [fol. 57] defendant is enjoined by this court from the collection of the same, plaintiff, to avoid said penalties and to avoid becoming delinquent for her general taxes, will be obliged to pay each one of said instalments as it comes due, under protest, and to sue for its recovery. This will cause a multiplicity of suits and a cloud will be placed upon his title and he will suffer great and irreparable loss and injury for which she has no adequate remedy at law.

Wherefore plaintiff prays that the defendant, Louis J. Huwe, as treasurer of Hamilton County, Ohio, be temporarily restrained from collecting any and all of the instalments of each and every one of said assessments, and that, upon final hearing hereof, he and his successors, be perpetually enjoined from collecting or enforcing the same, and the whole of each and every one of said assessments, and for all other relief necessary and proper in the premises.

Mortimer Matthews, Attorney for Plaintiff.

Jurat showing the foregoing was duly sworn to by Mortimer Matthews omitted in printing.

[fol. 58] IN COMMON PLEAS COURT

ORDER FOR TEMPORARY RESTRAINING ORDER

Forty cents due notary.

Let temporary restraining order issue as prayed for. Bond in the sum of five hundred dollars to the satisfaction of the clerk.

Roettinger, J.

IN COMMON PLEAS COURT

PRÆCIPE FOR SUMMONS

Please issue summons against the defendant, indorse action for equitable relief.

Mortimer Matthews, Attorney for Plaintiff.

IN COMMON PLEAS COURT

SUMMONS & SHERIFF'S RETURN

THE STATE OF OHIO,
Hamilton County, ss:

To the sheriff of the county of Hamilton:

You are commanded to notify Louis J. Huwe, as Treasurer of Hamilton County, Ohio (amended and supplemental petition), defendant, that he has been sued by Mortimer Matthews (amended and supplemental petition), plaintiff, in the Court of Common Pleas of Hamilton County, and that unless he answer by the fourth day of February A. D., 1922, the amended and supplemental petition of the said (amended and supplemental petition), plaintiff against him filed in the clerk's office of said court, such amended and supplemental petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 16th day of January A. D., 1922.

[fol. 59] Witness my hand and the seal of the said court at Cincinnati, this 5th day of January A. D., 1922.

Geo. W. Tibbles, Clerk of the Court of Common Pleas of Hamilton County, Ohio, by Albert Swing, Deputy. (Seal.)

Cincinnati, Ohio, January 6, 1922.

Served the within named defendant, Louis J. Huwe as Treasurer of Hamilton County, Ohio, by delivering to him personally, a true copy of this writ with all the indorsements thereon.

Ferd Bader, Sheriff Hamilton County, Ohio, by John Krieg, Deputy.

Sheriff's fees, 91 cents.

IN COURT OF COMMON PLEAS

ANSWER TO AMENDED PETITION—Filed January 7, 1922

The defendant, Louis J. Huwe, admits that he is the duly elected, qualified and acting Treasurer of Hamilton County in the State of Ohio, and was such at all times mentioned in the petition. That the tax duplicate for the year 1921 is in his hands as treasurer for the collection of taxes and assessments thereupon entered.

[fol. 60] Further answering, the defendant herein denies each and every allegation in said petition contained not herein specifically admitted to be true.

Louis Capelle, Pros. Atty.; C. S. Durr, Asst. Pros. Atty., Attorneys for Defendant.

Jurat showing the foregoing was duly sworn to by Louis J. Huwe omitted in printing.

[fol. 61] IN COURT OF APPEALS

MINUTE ENTRY OF JUDGMENT

Transcript and original papers filed April 5, 1922, Common Pleas Court, No. 177016.

1923, Apr. 25th (Jan. Term).—Minute 113. Decree finding for defendant and enjoining defendant from collecting interest on deferred instalments of assessments in excess of six per cent, plaintiff to pay two-thirds and defendant one-third of the costs in the Court of Common Pleas and each party to pay one-half costs in Court of Appeals.

This cause coming on to be heard on appeal from a judgment of the Court of Common Pleas of Hamilton County, Ohio, the pleadings and the evidence and having been argued by counsel and being fully advised in the premises the court finds:

1. That the County Commissioners of Hamilton County, Ohio, were authorized to levy assessments on the property in question; that their proceedings were had in conformity to law and that the assessments are valid.

2. That said assessments covering a period of ten (10) years, except so much of the interest included therein as is in excess of the rate of six per cent (6%) per annum, are a lien on the Real Estate.

[fol. 62] 3. That so much of the interest charges on deferred instalments as is in excess of the rate of six (6%) per cent per annum, the same rate of interest borne by the bonds, issued in anticipation of the collection of such assessments, is illegal and should be enjoined.

4. The court further finds that as to all matters except the interest on deferred instalments of assessments in excess of six (6%) per cent on each instalment from the date of the bonds to the time of the payment of the deferred instalment, the plaintiff is not entitled to an injunction as prayed for.

Wherefore it is ordered, adjudged and decreed by the court that the defendant, Louis J. Huwe, Treasurer of Hamilton County, be, and he, hereby is forever enjoined from collecting any interest on deferred instalments of assessments against the Real Estate owned by the plaintiff within the assessment area of the Glendale and Milford Road, Section X, in excess of six per cent (6%) from the date of the bonds issued in anticipation of the collection of said assessments to the date of the payment of said deferred instalments of assessments.

Coming now to assess the costs of this action, the court being fully advised, does hereby, order, adjudge and decree that two-thirds of the costs of this action, as incurred in the Court of Common Pleas, shall be paid by the plaintiff herein, and one-third by the defendant, and that one-half of the costs of this action incurred in this court shall be [fols. 63-243] paid by the plaintiff herein, and one-half thereof by the defendant.

And to all of the foregoing findings and judgment except so much thereof as enjoins the collection of a part of the interest on deferred instalments of assessments the plaintiff accepts.

May 8th.—Bill of Exceptions filed.

May 8th.—Waiver of Notice and consent to immediate transmission of Bill of Exceptions filed.

May 8th.—Bill of Exceptions transmitted to Judges Cushing, Buchwalter and Hamilton.

May 8th.—Bill of Exceptions received from Judges Cushing, Buchwalter and Hamilton signed and allowed.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 244] IN THE SUPREME COURT OF THE UNITED STATES

No. 834, October Term, 1923

MARIANNA MATTHEWS, Plaintiff-in-Error,

vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio, Defendant-in-Error

No. 835, October Term, 1923

MORTIMER MATTHEWS, Plaintiff-in-Error,

vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio, Defendant-in-Error

STIPULATION OF COUNSEL TO CONSOLIDATE AND AS TO PRINTING—Filed March 3, 1924

Cincinnati, Ohio, February 28, 1924.

The undersigned counsel for the respective parties in these two causes hereby stipulate that the two causes shall be submitted upon the same arguments and printed Briefs; that in the printing of the record in the case wherein Mortimer Matthews is plaintiff, the opinion of the Court below and the Bill of Exceptions and Exhibits attached thereto, beginning at page 36 of the printed record attached to the record, shall be omitted; and that in printing the record in the case wherein Marianna Matthews is plaintiff, Exhibits 1; 9; and 10; shall be reproduced in a reduced from approximate in size to Exhibits 12; and 13, thereto attached.

Mortimer Matthews, Counsel for the Plaintiffs-in-Error.
Chas. S. Bell, Pros. Atty., and Chester S. Durr, Asst. Pros. Atty., Counsel for Defendant-in-Error.

Endorsed on cover: File No. 30,145. Ohio Court of Appeals, First Judicial District. Term No. 298. Mortimer Mattthews, plaintiff in error, vs. Louis J. Huwe, as treasurer of Hamilton County, Ohio. Filed February 23rd, 1924. File No. 30,145.

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Supreme Court of the United States

No. [redacted]

OCTOBER TERM [redacted] 1925

MARIANNA MATTHEWS,

Plaintiff in Error,

(30144) vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio.

MORTIMER MATTHEWS,

Plaintiff in Error,

(30145) vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio.

In Error to the Court of Appeals for the First Judicial District of the State of Ohio.

BRIEF FOR THE PLAINTIFFS IN ERROR.

MORTIMER MATTHEWS,
Counsel for Marianna Matthews,
Plaintiff in Error,
and
Pro se.

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Supreme Court of the United States

Nos. 297 and 298.

OCTOBER TERM, 1924.

MARIANNA MATTHEWS,

Plaintiff in Error,

(30144) vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio.

MORTIMER MATTHEWS,

Plaintiff in Error,

(30145) vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio.

In Error to the Court of Appeals for the First Judicial District of the State of Ohio.

BRIEF FOR THE PLAINTIFFS IN ERROR.

STATEMENT OF THE CASES.

By stipulation of counsel, these two causes are submitted upon the same arguments and printed briefs. (Record 297, page 92; Record 298, page 24.)

The writs of error, in both, sued out on the same grounds, are for the review and modification of judgments of the Court of Appeals of Hamilton County, Ohio, in and for the First Judicial District of that state, favorable, so far as they went, to the plaintiffs in error. (Record 297, pages 1-4; Record 298, pages 1-4.) These judgments were entered on the twenty-fifth day of April, 1923. (Record 297, page 26; Record 298, page 23.) The plaintiffs excepted,

and brought as of right, proceedings in error thereto, upon the records herein, upon the same constitutional grounds, as herein alleged, and others, in the Supreme Court of Ohio, on May 24, 1923. These proceedings were dismissed by the latter court on the 4th day of December, 1923, on the sole ground that the records herein did not present any debatable constitutional question. (Record 297, page 12; Record 298, page 7; *Matthews* v. *Huwe*, 109 Oh. St. 628.)

The plaintiffs did not file motions in the Supreme Court of Ohio for certification of the record on the ground that the cases involved questions of public or great general interest. (See *infra*, page 16, for Argument on Jurisdiction.)

The proceedings in the court below were on appeal by the plaintiffs from adverse judgments of the Common Pleas. Under the Ohio practice, these were trials *de novo* in the Court of Appeals. (*Docket and Journal Entries*, Record 297, page 26; Record 298, page 23.)

The pleadings, on which the cases were tried together in both courts, consisted in Amended and Supplemental Petitions, and in Answers pleading general denials. (Record 297, pages 17-24, pages 25-6; Record 298, pages 12-21, page 22.)

The plaintiffs sought injunctions, under Section 12075 of the General Code of Ohio, providing that "Common Pleas Courts may enjoin the illegal levy or collection of taxes and assessments," and under Section 12077, providing that "Actions to enjoin the collection of taxes and assessments must be brought against the officer whose duty it is to collect them," against the collection by the defendant of certain assessments upon one tract of land belonging to Marianna Matthews, and upon five other tracts of land belonging to Mortimer Matthews, levied by the Commissioners of Hamilton County under an Act of the General

Assembly of the State of Ohio, 106 Ohio Laws 574 (637) and amended 107 Ohio Laws 69 (129), being Section 1214 of the General Code of the State of Ohio, for the improvement of Section X of the Glendale and Milford Road, being Intercounty Highway No. 46, Section X. (*Amd. and Sup. Petitions,* Record 297, pages 17-24; Record 298, pages 12-21.)

Section 1214 is one of the sections of the chapter upon the subject of intercounty highways and is as follows:

"Sec. 1214. Except as otherwise provided in this chapter, the county shall pay twenty-five per cent. of all cost and expense of the improvement. Fifteen per cent. of the cost and expense of such improvement, except the cost and expenses of bridges and culverts, shall be apportioned to the township or townships in which such road is located. If the improvement lies in two or more townships the amount to be paid by each shall be apportioned according to the number of lineal feet of the improvement lying in each township. Ten per cent. of the cost and expense of the improvement, excepting therefrom the cost and expense of bridges and culverts, shall be a charge upon the property abutting on the improvement, provided the total amount assessed against any owner of abutting property shall not exceed thirty-three per cent. of the valuation of such abutting property for the purposes of taxation. Provided, however, that the county commissioners by a resolution adopted by unanimous vote may increase the per cent. of the cost and expense of the improvement to be specially assessed and may order that all or any part of the cost and expense of the improvement contributed by the county and the interested township or townships be assessed against the property abutting on the improvement; and provided further, that the county commissioners by a resolution passed by unanimous vote may make the assessment

of ten per cent. or more, as the case may be, of the cost and expense of improvement against the real estate within one-half mile of either side of the improvement or against the real estate within one mile of either side of the improvement. Township trustees shall have the same power to increase the per cent. to be specially assessed and to change the assessment area where the improvement is made on their application. The county commissioners or township trustees upon whose application the improvement is made shall cause the county surveyor to make a tentative apportionment of the amount to be paid by the owners of the property specially assessed, which apportionment shall be made according to the benefits accruing to the land so located. The county surveyor shall file such apportionment with the county commissioners or township trustees for the inspection of the persons interested. Before adopting the estimate so made and reported the commissioners or trustees shall publish once each week for two consecutive weeks in some newspaper published in the county and of general circulation in the township where the improvement is located notice that such estimated assessment has been made and that the same is on file in the office of the county commissioners or with the township trustees and the date when objection, if any, will be heard to such assessment. If any owner of property affected thereby desires to make objections he may file his objection to said assessment in writing with the county commissioners or township trustees, as the case may be, before the time for said hearing. If any objections are filed the county commissioners or township trustees shall hear the same and act as an equalizing board and they may change said assessments if in their opinion any change is necessary to make the same just and equitable, and such commissioners or trustees shall approve and confirm said assess-

ments as reported by the surveyor or modified by them. Such assessments when so approved and confirmed shall be a lien on the land chargeable therewith. (107 Ohio Laws, 129, 130.)"

By agreement, the two causes were tried in the Court of Appeals *together* upon the transcript of evidence and exhibits at their trial *together* in the Common Pleas; and one joint and several Bill of Exceptions was allowed and signed, and filed in each of said causes, in the Court of Appeals. *It contains all the evidence offered and submitted to that court.* (*Bill of Exceptions,* Record 297, pages 27-91.)

By stipulation this Bill of Exceptions is printed in the Record of cause No. 297 only. (Record 297, page 92; Record 298, page 24.)

The two judgments of the Court of Appeals, the modification of which is sought, were based upon findings therein, that the Commissioners of Hamilton County, Ohio, were authorized to levy the assessments in question, *that their proceedings were had in conformity to law, and that the assessments were valid;* that said assessments, covering a period of ten years, except so much of the interest included therein, as is in excess of the rate of six per cent. per annum, were a lien on the plaintiffs' real estate respectively; that so much of said interest, as was in excess of that borne by certain bonds, issued in anticipation of the collection of such assessments, was illegal, and by said judgments, its collection was forever enjoined; but the court further found that as to all matters, *except* said excess interest, the plaintiffs were NOT entitled to injunctions, as prayed for by them, and refused to enter decrees therefor. (Record 297, page 26; Record 298, page 23.)

The opinion of the Court of Appeals is printed in the record (Record 297, pages 7-11); but has not been reported.

Among the allegations of the Amended and Supplemental Petitions, at pages 23 to 24 of Record 297, and at page 20 of the Record in cause, No. 298, are the following:

"Said Board of County Commissioners * * * in assessing plaintiff's land not abutting upon the improvement, but upon a parallel County road, and not lying within a half mile thereof by the nearest connecting public roads; and not benefited thereby; and upon an arbitrary plan which was not according to benefits accruing to the same; * * * and in including the value of buildings and improvements in its assessment; * * * acted in each and every one of said specifications without jurisdiction or authority, and all of said assessments on plaintiff's property are illegal and void."

"If said assessments are enforced, plaintiff will be deprived of her (his) property for public use, without compensation and so far as abutting property owners may have been relieved from assessment, for private use, and without due process of law, in violation of her (his) rights as the owner thereof, and in violation, * * * of the Fourteenth Amendment to the Constitution of the United States of America."

The assignments of error, and the evidence and exceptions also involve the question whether the assessments complained of and the construction of Section 1214 of the General Code of the State of Ohio, so as to justify the same, were a taking of the plaintiff's property, and a denial to them of due process of law. (*Assignments of Error*, Record 297, pages 3-4; Record 298, pages 3-4.) [*Specification of Errors, infra*, pages 11-12.]

The tracts of land belonging to the two plaintiffs in error, which are assessed, are described in the Amended and Supplemental Petitions, and appear on two plats. (*Plaintiffs' Exhibits 1 and 10*, Record 297 between pages 90-91.)

They also appear in convenient schedule form in Plaintiffs' Exhibit 3. (Record 297, pages 75-76.) In the Stewart plat (Exhibit 1), they appear below and south of the broken line, which is drawn parallel with Section X, and are identified by the names of the plaintiffs in error respectively. In plat (Exhibit No. 10), also, the various tracts are identified by the names of their respective owners.

These lands of the plaintiffs lie and abut upon a county road situated in a direct line less than one-half mile north of Intercounty Highway No. 46, Section X. They lie within one-half mile of, but do not abut upon the latter, nor upon any connecting road, within a half mile of it by such road. This county road, called Oak Road, is approximately parallel with this Section X of this Intercounty Highway *throughout the entire length of both,* as appears by the Road Map of Hamilton County, at a place marked "Oak" a little west of the northeast corner thereof, south of a line between Glendale and Sharonville. (*Plaintiff's Exhibit No. 9,* Record 297, between pages 90-91.)

None of these lands can use this Section X, except by the intermediate use of from more than half a mile to a mile of the parallel road, on which they abut, and other cross-roads. (*Plaintiff's Exhibit 1 and 10, Testimony J. A. Stewart,* Record 297, pages 30-33.)

The county commissioners on May 11, 1920, adopted resolutions reciting certain initial proceedings, and declaring it necessary to improve THAT PART of this Intercounty Highway, beginning at the point where it intersects Intercounty Highway No. 43, thence east along its route to the point where it intersects Intercounty Highway No. 19, being all in Springfield and Sycamore townships, and comprising a distance of two and fifty-seven hundredths miles, designated and THEREAFTER to be known as Section X of the Intercounty Highway in question. (*Plaintiff's Ex-*

hibit 11, Record 297, pages 82-84; *Gast's Road Map, Plaintiff's Exhibit 9,* Record 297, between pages 90-91.)

These resolutions of May 11, 1920, provided that ten per cent. of the total cost of Section X should be assessed against ALL the real estate within one-half mile of both sides of Section X; and instead of following the express phraseology of Section 1214, and providing that it should be apportioned according to the benefits accruing to these lands, actually and expressly directed the arbitrary division of the amount to be assessed, into three equal parts, one of which parts should be assessed against ALL the property abutting upon Section X IN PROPORTION TO THE NUMBER OF FRONT FEET contained in each part, parcel, tract, and lot abutting thereon; that the second part should be assessed against ALL the property within one-half mile of both sides thereof IN THE PROPORTION TO ITS ACREAGE OR AREA; and, finally, that the remaining one-third should be assessed against ALL the said property IN PROPORTION TO THE TAX VALUATION OF EACH PART, parcel, tract, and lot involved, as the same appears on the tax duplicate of Hamilton County.

The county commissioners afterwards, on May 28, 1920, adopted resolutions, determining to proceed with the improvement, and instead of requiring the county surveyor, under the express phraseology of Section 1214 (*supra* 4) to make a *tentative apportionment* of the amount to be paid by the property owners (*upon his own independent judgment*) according to the benefits to the land to be assessed, expressly directed him to make, by actual view, an "ESTIMATED ASSESSMENT" upon the lands, IN ACCORDANCE WITH THE ARBITRARY PLAN THERETOFORE ADOPTED by the board, by its resolutions of May 11, 1920. (*Plaintiff's Exhibit 11,* Record 297, page 86.)

The board afterward, on June 22, 1920, adopted a resolution, RECITING that the county surveyor had filed an "estimated assessment" against the property lying within one-half mile of either side of Section X, and had proportioned the total amount to be raised by assessing said property IN ACCORDANCE WITH THE PLAN THERETOFORE ADOPTED by the board, and providing that the "estimated assessment", *so made,* be advertised, as notice to property owners. This resolution provided for said publication, without describing the lands lying within one-half mile of Section X, *except as such, and without naming their several owners,* to many of whom, including the plaintiffs, the name, number and section of said intercounty highway, having been but recently given by the resolutions of May 11, 1920, (*supra,* page 7) were, *and must have been,* unknown. This publication was not provided to be made, nor was it made, in a newspaper of general circulation in Springfield and Sycamore Townships, where the improvement was located, as required by the specific terms of Section 1214. It was also authorized and made *after* and not "before" the *real* adoption of the estimate, as required by the same section. (*Plaintiff's Exhibit 11,* Record 297, pages 87-89; *Affidavit of Publication,* Record 297, pages 88-89.)

The plaintiffs had no actual knowledge of the assessments until long after they were made. (*Bill of Ex.,* Record 297, pages 33-4, 49.)

The board afterward, on July 9, 1920, adopted resolutions, fallaciously reciting that the "apportionment", *so made,* was according to the benefits which will result in said real estate; and that no valid objections had been filed thereto, and providing that "said estimated assessment" was thereby approved; and that such parts as should be unpaid, be certified to the county auditor, and placed by him upon a special duplicate, to be collected as other taxes;

and directing the clerk of the board to so certify said assessments; all of which was done. (*Plaintiff's Exhibit 11,* Record 297, page 90.)

The work upon the improvement was not begun until several months after the commencement of these suits, and the obtaining of preliminary restraining orders against the collection of the assessments. (*Bill of Exceptions,* Record 297, page 54.)

The county commissioners, in assessing one-third of the amount to be assessed in proportion to the tax valuation of each part, parcel, tract, and lot involved, as the same appears on the tax duplicate of Hamilton County, included therein, as a positive factor, and in a definite inflexible ratio, not only the tax value of the land itself, as valued for taxation, but also that of the buildings thereon as separately appraised, and separately extended upon the tax duplicate of Hamilton County. (*Plaintiffs' Exhibit 11,* Record 297, page 83; *Testimony W. H. Meinhardt,* Record 297, pages 40-46.)

SPECIFICATION OF ERRORS.

The errors relied upon are shown by the Assignment of Errors (Record 297 and 298, pages 3-4), and are as follows:

First. The plaintiff's lands, which were assessed, lie and abut upon a county road approximately parallel with the improvement, throughout the entire length of both, and lie, in a direct line, within one-half mile of, but do not abut upon the improvement, nor upon any connecting road, within one-half mile by such road, whereas other assessed lands, not abutting upon the improvement, nor upon said parallel county road, abut upon other connecting roads at a very much shorter distance from said improvement, or have access thereto, over other abutting lands of the same owner, at very much shorter distances. As the apportionment above described omitted to take into account either the factor of direct distance, or that of distance of access, which are those, without which no valuation of relative benefits could have been made, as between the plaintiff's lands and said other assessed lands not abutting upon the improvement, but lying much nearer and having much nearer access thereto, said assessments and their justification under said section 1214, result in the deprivation of the plaintiff of her (his) property without due process of law.

Second. Some of the plaintiff's property, more distant, as it is, than other non-abutting and also abutting property, was of higher tax valuation, and had upon it buildings of much greater tax valuation than some of either of the latter. It was upon a wrong and plainly arbitrary principle, and a deprivation of the plaintiff of her (his) property without due process of law, to include, as a factor in the valuation of relative benefits, in a definite inflexible ratio, either the value of bare land, or buildings, without reference to distance, whether direct, or by means of access, or the value of buildings, at all, as a part of the value of lands.

Third. All of the plaintiff's property abutting, as it did and does, upon a county road approximately parallel to the improvement throughout the entire length of both, had and has no need of the improvement as a means of access. As the value of the plaintiff's land depends wholly upon its own direct means of access thereto, it owes none of its value to the road for the improvement of which it has been assessed, and has received therefrom, no particular or special benefit, to any extent whatsoever, within the meaning of such, as under section 1 of the Fourteenth Amendment to the Constitution of the United States, local assessments may be levied; between which and common or general benefits, there is a wide distinction, the same for the assessment of special benefits as for damages. The assessment of plaintiff's lands, in any sum whatsoever, and the justification thereof under said section 1214, results in the deprivation of the plaintiff of her (his) property without due process of law, within the meaning of the terms of said Constitutional provision.

ILLUSTRATIONS.

We append here some illustrations of the way these "irrational irregularities", as we claim them to be, work out in detail, in dollars and cents, from the assessment book and the assessment roll, as testified to by William H. Meinhardt, Deputy Auditor (Record 297, pages 36-48), and from distances scaled from plaintiffs' Exhibits 1 and 10 and from data taken from plaintiffs' Exhibits 12 and 13, and 3 and 5. (Record 297 between pages 90-91; Record 297, pages 75 and 76.)

They may be regarded as an *appendix,* not to be noticed, until the argument has been apprehended, or may be glanced through here, as showing the seriousness of our claims, and therefore as anticipatory of their merits.

(a) Archbishop Moeller's 9.21-acre tract (Plf. Ex. 10), not abutting on Section X, but on the intersecting Lockland road, the center of whose front, by scale, is about 1,100 feet by road from Section X, is assessed a total of $79.26, or $8.06 per acre. ON THE OTHER HAND, the Mortimer Matthews 5.96-acre tract, the center of whose front on Oak road is distant 4,400 feet by road from Section X, is assessed a total of $47.89, or $8.04 per acre—an allowance of two cents an acre on account of four times the PRACTICAL distance. And this is to say nothing of the quite apparent fact, that it is about three times the distance in a direct line, through which it has no access to Section X, while the Moeller 9.21-acre tract does have such direct access, through the 10-acre tract belonging to the same owner. Neither of these properties is assessed upon any building value. (Record 297, page 39; *Exhibits 1 and 10.*)

(b) Archbishop Moeller's two tracts of 7.68 and 6.14 acres, 13.82 acres in all, bordering on the west side of the canal (Exhibit 10), not abutting on Section X, as changed by the new curve, (Plf. Ex. 1) whose front line, however, has access thereto, through his own land in the new curve, at a distance of 400 feet, are assessed for the two parcels, a total amount of $79.19, or $5.73 per acre. ON THE OTHER HAND, the Mortimer Matthews 59.97-acre tract, twice as far as these, even in a direct line, through which it has no access, and having no actual access from the central point of its front on Oak road, except VIA 4,400 feet of parallel and intersecting roads, is assessed a total of $485.73, or $8.10 an acre. Eleven times the distance of practical access, and more than one and a half times the assessment. This "irrational irregularity" is somewhat affected by the factor of tax valuations on buildings, for that on the Moeller

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(Note—The above 6.14-acre tract is misprinted 6.32 on the plat, Exhibit 10.)

tracts is $670.00, while that on the Matthews tract is $850.00. (Exhibits 12 and 13.) (Record 297, pages 38 and 42.)

(c) Archbishop Moeller's six tracts, separated from Section X by only the varying breadth of other land of his, thrown by the new curve (Plf. Ex. 1) from the south to the north side of Section X, the greatest width of which is about 400 feet, are shown on Exhibit 10, beginning at the west, as being tracts of the following dimensions: 7.55, 7.67, 7.68, 6.14, 9.21, and 10 acres in extent—in all 48.27 acres. They are assessed a total of $502.37, or $10.40 per acre. ON THE OTHER HAND, the Mortimer Matthews 44.07-acre tract, approximately the south half of his 87.59-acre tract (Exhibit 10), distant an average of four times as far in a direct line, by which it has no access, and an average of six or seven times as far by road, is assessed a total of $484.10, or $10.98 per acre—a concession to the Moeller tracts of fifty-eight cents per acre on account of the inconvenience of being that much nearer the improvement. The assessment pretends that the Matthews tract has been benefitted fifty-eight cents an acre more than the Moeller tracts. To be sure the Matthews tract contained valuable buildings at the time of the assessment, much more valuable than those on the Moeller tracts, AT THAT TIME, but there was nothing to prevent the Archbishop from erecting immediately thereafter institutional buildings many times more valuable. Beside this the Matthews land and its buildings owed their value, either for use or sale, wholly to the access furnished by their own Oak road and not in any degree to Section X. If Oak road were not there, the Matthews land and buildings, unless owned by Archbishop Moeller, would be practically worthless. (Record 297, pages 39, 41, 42; *Plaintiffs' Exhibit 4*, Record 76-78; *Plaintiffs' Ex. 10.*) See Note to **(b)** (*supra*).

(d) Archbishop Moeller, on his 152.95-acre tract, on which there are buildings of a taxable value of $3,050, and of a total tax value, land and buildings, of $19,100, and *abutting* on the improvement, is assessed a total of $3,459.79, or $22.62 per acre. ON THE OTHER HAND, Marianna Matthews, on her 7.10-acre tract, of a total value for land and buildings of $8,080, situated almost half a mile in a direct line from the improvement, and having no access thereto, except by more than three-quarters of a mile by road, is assessed a total amount of $239.28, or $33.70 an acre. Her land is asserted to have been benefitted $11.08 more per acre than Archbishop Moeller's abutting lands. The higher valuation for taxation of her buildings situated for all practical purposes nearly a mile from the improvement, it is pretended, justify a fifty per cent. higher assessment than on *abutting* lands with their *nearby* buildings, having direct access to the improvement. (Record 297, pages 41-2, Plf. Ex. 12.)

(e) Archbishop Moeller's tract of 7.68 acres bordering on the west side of the canal (Exhibit 10), not abutting on Section X, whose south or front line, however, has direct access thereto, through his own land, at a distance of about 1,000 feet, of a total value upon the exempt duplicate of $50.00 (Plf. Exhibit 12), is assessed $8.13 or $1.06 per acre. ON THE OTHER HAND, the Marianna Matthews 7.10-acre tract, of a total value for land and buildings of $8,080, situated almost half a mile in a direct line from Section X, and having no access thereto, except by 4,500 feet by road, is assessed a total amount of $239.28, or $33.70 per acre. Here is an assertion that her 7.10-acre tract is benefitted nearly thirty-two times as much as the Moeller 7.68-acre tract. As the area is nearly the same, this very violent assumption is due solely to the higher valuation of land and buildings, ignoring entirely the factor of access and dis-

tance—more than twice the direct distance, and four and a half times the distance of access as against nearly thirty-two times the pretended benefit and the assessment.

Situated as it is, *not* on Section X at all, but upon a *parallel* road, this 7.10-acre tract is the highest assessed property in the entire assessment.

ARGUMENT.

I. JURISDICTION.

The judgments of the Court of Appeals are those of the highest court in the State of Ohio having jurisdiction to hear these suits upon these alleged constitutional questions.

It is provided by the Judicial Code, Section 237, that "a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute, or an authority exercised under any state, on the ground of their being repugnant to the constitution * * * and the decision is in favor of their validity, may be reexamined and reversed, or affirmed in the Supreme Court upon a writ of error."

The Constitution of the State of Ohio, Article IV, Section 2, provides first, that the Supreme Court of Ohio shall have "appellate jurisdiction in all cases involving questions arising under the Constitution of the United States or of this state"; and second, that "in cases of public or great general interest the Supreme Court may within such limitation of time as may be prescribed by law, direct any Court of Appeals to certify its record to the Supreme Court, and may review and affirm, modify or reverse, the judgment of the Court of Appeals."

The plaintiffs brought proceedings in error, as of right, in the Supreme Court of Ohio on these and other constitu-

tional grounds. They were dismissed on the sole ground that the records herein did not present any debatable constitutional question. The plaintiffs did not file motions for orders directing the certification of these records on the ground that the cases were of public or great general interest.

The question of jurisdiction is whether or not the latter course was necessary to give this court jurisdiction, in view of the fact that the former course had been taken.

The case of *Stratton* v. *Stratton*, 239 U. S. 55, might seem to require an affirmative answer, unless distinguished. By the report of that case, it does not appear that the plaintiff in error therein had essayed to bring proceedings in error as of right. This court said that it was invited to assume jurisdiction by exercising an authority which it had not, "that is by indulging in conjecture as to what would or would not have have been the judgment of the Supreme Court of Ohio, if it had been called upon to exert the discretion vested in it by state laws." This seems to be the ground upon which that decision is based, because the court added "When the significance of the proposition, upon which the claim of jurisdiction is based, is *thus* fixed, it is not open to contention, as it has long since been adversely disposed of." This ground does not exist in the cases now before the court. There can be no conjecture here as to what would or would not have been the judgment of the Supreme Court of Ohio, because it has decided that no debatable constitutional question is presented by these records. It could not possibly have directed their certification because of public or great general interest. Where there is no question at all, or no debatable question, it can not possibly be of public or great general interest. The decision of the one is inclusive of the decision of the other.

Again, at the time the Supreme Court of Ohio dismissed the proceedings in error, and thus decided it had no appellate jurisdiction upon the constitutional questions alleged, the time had long since expired, within which it had discretionary jurisdiction to direct the certification of the records on the ground of "public or great general interest." It is only "within such limitation of time as may be prescribed by law", that it was given this discretionary jurisdiction. After seventy days, which is the limitation prescribed by the court itself, in *Akron* v. *Roth*, 88 Oh. St. 457, all questions, which had been before the Court of Appeals were excluded, except the alleged constitutional questions, pending on error, brought as of right. It was not until the dismissal for lack of such jurisdiction, that *it became the law of these cases*, that the Court of Appeals was the highest court, in which a decision on these segregated constitutional questions could be had. This dismissal was the cause, by which alone finality can be attributed to the judgments of the latter court, on the *only* questions which can be brought to this court. Our contention, therefore, that its judgments upon the federal questions thus segregated, were final judgments, "susceptible of being here reviewed by writ of error", *do not* "rest upon the impossible assumption", that their finality "existed before the happening of the cause, by which alone finality could be attributed to them." These judgments thus susceptible of being reviewed here were *not open at the same time* to the power of the Supreme Court of Ohio to review and modify. It is *thus* we distinguish *Andrews, Admx.* v. *Virginian Railway Co.*, 248 U. S. 272.

The situation is what it would be, if the statute law of Ohio were such, that the decisions of the Court of Appeals on constitutional questions were final, and that the Supreme Court had discretionary appellate jurisdiction, on all *other*

questions of public and great general interest. In such case, there could be no doubt, that this court would assume jurisdiction. Can it make any difference, that the situation is created by an act of the Supreme Court, as the law of these cases, and not by an act of the legislature, as the law for all? We think not.

Finally, if this court shall decline to entertain jurisdiction, it will certainly tend to increase the efficiency of this two-fold jurisdiction of the Supreme Court of Ohio, as a trap, not only for the merely unwary, but also, and all the more, for those who like ourselves, as may be seen by an examination of the merits, had every reason to believe they had at least a debatable constitutional question, *even* in that court. We realize completely, that this court does not gratuitously seek opportunity to review the judgments of state courts. It remains nevertheless, that it is solemnly charged by the Fourteenth Amendment with the protection of citizens of the United States against aggresive state action. Under a variety of circumstances, it has previously prevented its jurisdiction so to do, from being incidentally defeated by state laws, whether designed, or not, for such a purpose, especially in cases, where the repugnancy to the constitution was clear, as we claim it to be here.

Myles Salt Co. v. *Iberia Drainage District,* 239 U. S. 478.

Gast Realty Co. v. *Schneider Granite Co.,* 240 U. S. 55.

See also,

Thornton v. *Road Imp. Dist.,* 291 F. 518, 527-530.

If the point is made, that there is no jurisdiction, in a Court of Equity, to hear these questions, because the plaintiffs did not file objections before the county commissioners, as an equalizing board, under Section 1214, the authorities

immediately above cited meet the point. The kind of notice given, and the fact, that the plaintiffs had no actual knowledge, are sufficiently detailed *supra* page —. Furthermore, if the point is otherwise well taken, the findings of the Court of Appeals, and its judgment upon the merits exclude the question. That question could not have been preserved for decision here, except by a dismissal by the Court of Appeals for lack of jurisdiction, or some such equivalent action.

II. DISTANCE OF ACCESS.

Acting, as they supposed, and as has been held by the Court of Appeals, under Section 1214, the county commissioners by resolution divided the total amount to be assessed, $15,607.15, into three equal parts of $5,202.38, one of which they apportioned to all of the lands abutting on the improvement according to frontage, another to all of the lands within one half mile of the improvement, according to acreage or area, and the last to all the same lands according to their tax valuation for land and the buildings thereon, as the same appear on the tax duplicate of Hamilton County.

The plaintiffs' lands, which are assessed, all lie and abut upon a county road situated in a direct line less than one-half mile north of said improvement, and lie within one-half mile of, but do not abut upon it, nor upon any connecting road, within a half-mile by such road. This county road is approximately parallel with the improvement throughout the entire length of both. None of the plaintiffs' lands can make any use of the improvement, except by the intermediate use of from more than a half mile to a mile of the parallel county road on which they abut, and other intersecting roads. They are assessed nevertheless at the *same* rate per acre, and at the *same* rate per dollar of tax valuation for land and buildings, as other lands, not

abutting upon the improvement, but lying within a few hundred feet thereof, upon said intersecting roads, and within less than a quarter of their distance therefrom by direct line, by which some of them have access thereto, through other abutting lands of the same owner. The resolution establishing these assessments was held to follow Section 1214 of the General Code of Ohio, and to be consistent with the Fourteenth Amendment by the Court of Appeals.

The resolution, following the statute *as construed,* so far as lands not abutting on the improvement are concerned, totally ignored the factor of distance, either in a direct line or of access, and as applied to the higher tax valuation of the land and buildings of the plaintiffs at a considerably greater distance from the improvement than other land and buildings quite near the same, disclose many gross inequalities.

See illustrations **(a)**, **(b)** and **(c)** *supra* 13-14.

The apportionment was not based upon any consideration of difference in the benefits conferred, but was established mechanically in obedience to the *criteria* that the resolution directed to be applied. The plaintiffs' case is not an incidental result of a rule, that, as a whole, and on the average, may be expected to work well, but of a resolution that, in result, is "a farrago of irrational irregularitites throughout." It is enough that the resolution, following the orders of the statute, *as construed,* is bad upon its face, as distributing a local tax in grossly unequal proportions, not because of special considerations applicable to the parcels taxed, but in blind obedience to a rule that requires the result. And it can not be said, that the resolution as a whole, may be regarded as an individual exception under a rule that promises justice in all ordinary cases. The provisions of the statute as applied to a county like that of

Hamilton, must be taken to contemplate such resolutions, under the construction given to it by the Court of Appeals.

It is apparent that we allege the facts to be analogous in principle, to those under consideration in a recent case decided by this court, and assert, that these cases are governed by the rule laid down in that.

Gast Realty Co. v. *Schneider Granite Co.*, 240 U. S. 55.

That rule briefly stated is, "A law establishing a taxing district, under which there is no reasonable presumption that substantial justice will be done, but under which parties will probably be disproportionately taxed, can not stand as constitutional against one actually so taxed."

The only SUGGESTION of the valuation of relative benefits in this plan, is that abutting property is subject to all three of the assessments, and other property to only two; but this is an entirely arbitrary treatment, as between even these two classes of property. And it is entirely insufficient, because leaving out of account the very apparent difference between non-abutting property situated near the improvement, and benefitted very little less than abutting property, and non-abutting property lying much more distant, and benefitted little, if any. It would seem, that, as applied to such situations, this three-way average is not merely inadequate, but palpably arbitrary. The resolution could not have become, *even debatably*, a rule to aid in producing equality and uniformity, as applied to the plaintiffs' lands, except by amendment of its last two factors, so as to read in some such way, as appears within brackets, as follows:

" 'That the second part thereof shall be assessed against all property coming within the purview of said improvement in proportion to the acreage or area thereof,' [EXCEPT such property as abuts upon parallel or intersecting roads, at a distance by said road or roads of more than one-

half mile from said improvement, UPON WHICH THERE SHALL BE ASSESSED only fifty per cent. or less, thereof, upon a sliding scale of percentages, depending in inverse ratio, upon its average distance, that is, the distance, of its approximately central point, by said road or roads from said improvement.'']

"'That the remaining one-third of said assessment be assessed against all the property coming within the purview of said improvement in proportion to the tax valuation of each part, parcel, tract and lot involved as the same appears on the tax duplicate of this county,' [EXCEPT such property as abuts upon parallel or intersecting roads, at a distance by said road or roads of more than one-half mile from said improvement; UPON WHICH THERE SHALL BE ASSESSED only fifty per cent. or less of that otherwise attributable to its bare land tax valuation, upon a sliding scale of percentages, depending, in inverse ratio, upon its average distance, that is, the distance of its approximately central point, by said road or roads, from said improvement; and UPON WHICH THERE SHALL BE ASSESSED only fifty per cent. or less of that otherwise attributable to the tax valuation of the buildings thereon, upon a sliding scale of percentages, depending, in inverse ratio, upon the distance of each building, by said road or roads, from said improvement.'']

These suppositious amendments do not pretend to cover the whole ground. They are intended merely to point out one fatal omission. Good so far as they go, they are suggested by what the Supreme Court of Ohio said in a recent case, wherein it was held that such rules of apportionment, as applied to established facts and situations, are either reasonable, or not, *as a question of law.*

Conservancy Dist. v. *Ryan*, 104 O. S. 79-81, 87-89.

In order to call attention to the fact, that the hearty commendation that court gave the rule in *Conservancy District* v. *Ryan*, can not be made applicable to the arbitrary plan of apportionment here, but in reality supports our contention, we quote, beginning at page 80, as follows:

"The basis of the assessment was the fair value of the property as of a date just prior to the 1913 flood, and the assessments were to be calculated by a COMPREHENSIVE system of percentages in which all properties which had been inundated to a depth of more than thirteen feet would bear the maximum assessments, and all other properties would be assessed upon a SLIDING SCALE OF PERCENTAGES DEPENDING UPON THE DEPTH OF INUNDATION, in which MANY COLLATERAL FACTORS were to be considered, * * * and it is sufficient to say that the plan was a very comprehensive one and ADMIRABLY COVERED A GREAT VARIETY OF CONDITIONS."

The court continues at page 88 to further commend this "flooding factor" plan, as it is called at that place.

What the county surveyor should have had for Section X, was a "distance" or "access factor" plan, in order to have made a real apportionment according to benefits. Our assertion is that distance of access here is, in inverse ratio, analogous to depth of inundation there. That court held the "flooding factor" plan as a question of law reasonable there; and with equal reason, we submit, this court should hold the omission of a "distance factor" unconstitutional here, as it did the omission of an "equal depth" factor in *Gast Realty Co.* v. *Schneider Granite Co.*

In addition, however, to these cases, we beg to cite several other directly pertinent authorities:

State v. *Brill*, 58 Minn. 152, 156-7-8.
Appeal of Piper, 35 Cal. 530.

Ry. Co. v. *Road Imp. Dist.*, 256 U. S. 658, 659-661.
People v. *Syracuse*, 63 N. Y., 291, 300.

State v. *Brill* (*supra*) is a most enlightening case, as applied here. The facts were that a proposed park having been established on the southerly point of a bluff, the "assessment district" to be assessed for benefits, extended from the park north about a mile and a quarter. The board of public works divided this district into several sections or subdistricts, divided from each other by east and west lines—each subdistrict being about one-half mile wide from north to south—and assessed every lot within a particular subdistrict the same amount regardless of their relative distances from the park. It was held, that, in thus appraising the benefits to the respective lots, the board adopted *an arbitrary and illegal rule.*

The court said: (158) It is *self-evident* that these benefits are, in a great degree, *in proportion to the proximity of the property to the park—the benefit diminishing as the distance increases.* Now, the law does not require absolute equality in taxation, but only equality as near as practicable. Hence, it is not required that the board, in making these assessments, should graduate them uniformly, in exact proportion to distance, as the ATMOSPHERE GRADUALLY SHADES OFF INTO SPACE. This is altogether impractiable. But they must make the assessment uniform in proportion to benefits, as near as reasonably practicable. This they did not do in this case. It is perfectly evident that, to SAVE LABOR, they adopted an ARBITRARY AND INFLEXIBLE basis of assessment in each of these subdistricts; assessing every lot in it exactly the same amount, in utter DISREGARD OF ITS DISTANCE from the park. Take, for example, the first subdistrict north of Burns avenue, which was half a mile wide from north to south—how long from east to west does not clearly appear.

A lot on the extreme south side of this subdistrict was assessed $7.20, exactly the same as a lot on the extreme north side—although the latter was half a mile further from the park than the former. The same is true of the next subdistrict, and so on. Moreover, two lots lying side by side and consequently practically equally distant from the park, if divided by an imaginary line between two subdistricts, would be assessed, one $7.20 and the other $3.60, or one $3.60, and the other $2.50, as the case might be. * * * Such an *arbitrary system* of apportioning * * * can not be sustained."

In the Appeal of Piper, (*supra*) the court say, in regard to one of the questions at issue therein, as follows:

(532) "ON THE CROSS STREETS, THE RATE OF ASSESSMENT DIMINISHED FOOT BY FOOT AS THE DISTANCE FROM KEARNEY INCREASED. On some of the principal cross streets, this rate or scale COMMENCED AT ELEVEN DOLLARS PER FRONT FOOT; on others, when the grade was steep or the street narrow, and consequently the benefit less, this scale of eleven dollars WAS DIMINISHED IN PROPORTION, in some cases one-third, in others one-half, etc."

(551) "It is ARGUED that if the apportionment on Kearney street is made upon a correct principle, then the apportionment on Third street, and the cross streets within the district determined to be benefitted, which was made upon a different hypothesis, must necessarily be erroneous. BUT THIS CONCLUSION DOES NOT NECESSARILY FOLLOW. These streets occupy an entirely different relation to the improvement."

In *Ry. Co.* v. *Road Imp. Dist.*, 256 U. S. 658, this court, Mr. Justice Mc Reynolds, delivering the opinion, at page 660, said:

"The assessors made estimates as to farm lands and town lots according to area and *position* and wholly without regard to the value of the improvements thereon, or their present or prospective use. On the other hand, disregarding both area and position, they undertook to estimate benefits to the property of plaintiffs in error without disclosing any basis therefor, but apparently according to some vague speculation as to present worth and possible future increased receipts from freight and passengers which would enhance its value, considered as a component part of the system."

The application of what is last quoted, lies in this, that the assessment of which we complain utterly disregards the POSITION of our property, EXCEPT SO FAR AS IT IS NOT ABUTTING PROPERTY.

In *People* v. *Syracuse,* 63 N. Y. 291, it is said at page 300:

"In ascertaining what the relative benefit is to different parcels of land, the SITUATION of the different lots * * * *whether access to them is needed* * * * may properly be regarded by the commissioners."

III. VALUE.

It was palpably arbitrary for these assessments to *include* in a definite inflexible ratio, as a factor in an appraisement of benefits of the plaintiffs' lands—(1) the value of bare land or buildings, without reference to their distance of access from the improvement;—or (2) the value of even bare land upon a parallel road,—or (3) the value of buildings, as a part of the value of lands.

(1) That the value of land and buildings, *without reference to distance,* was arbitrary, need not detain us. That is really a question of access and distance, and has been sufficiently argued. It is mentioned here, merely the more

sharply to give point to the second and third branches of the proposition; to bring the entire subject of value into one comprehensive proposition.

(2) It was palpably arbitrary to include, in a definite and inflexible ratio, even the value of bare land itself, not abutting on Section X, and therefore not owing any part of its value thereto, but owing its value wholly to a parallel road upon which it was situated.

It is only when values DEPEND upon a road to be improved, and vary acordingly as the road exists or does not exist, or becomes impassable, or is improved, that they may be used at all, in whole or in part, as a definite measure of the presumably increased benefits accruing from its improvement. The value even of bare land has never been taken as a *definite* measure, of benefit, *except upon abutting lands.*

See illustration **(c)** *supra* 14 and remarks appended thereto.

Thornton v. *Road Imp. District,* 291 F. 518.
Fidelity Nat. Bank v. *Trust Co.,* 2 F. (2nd) 676.

If it be said, or thought, that this branch of the argument and these authorities go too far, that is, that they support a proposition that land on a parallel road is *not assessable at all*—we answer that they do.

We do not argue the more comprehensive proposition except incidentally, not being necessary to an injunction against these assessments, but only to an injunction against any re-assessment at all, of the plaintiffs' lands.

If this court should approve these decisions of the Circuit Court of Appeals, Eighth Circuit, that final action is what, of course, we desire to accomplish.

If we are right in saying that this land upon a parallel road is not assessable at all, the cases come within the rule

in *Myles Salt Co.* v. *Iberia Drainage District*, 239 U. S. 478, *and are of very simple* solution.

(3) It was palpably arbitrary to include the value of buildings at all, as part of the value, upon which the definite and inflexible ratio of one-third of the assessment was levied.

See illustrations (c), (d) and (e) *supra*, pages 14-15.

Buildings are not enhanced in value even by improvements upon which they abut. A building is worth no more than it will cost to put another there like it, and the net rent over wear and tear, during the time required to erect it. Immediately after an assessment the building may be destroyed by fire. If insured the proceeds are personal property, not real estate, and may never go back into a new building. Provisions are made in the statutes of Ohio in such cases, for deducting the tax valuation of buildings from the tax duplicate. This is the reason for the separate valuation of the bare land and the buildings on those books. At the time of assessment like these, one owner may be assessed upon bare land worth $1,000.00, and a building thereon worth $5,000.00, total $6,000.00. His next neighbor may be assessed only upon an equal tract of bare land worth $1,000.00. The next week the building may burn down; and his next neighbor may begin the erection of a building worth $5,000.00, total $6,000.00. The former, however, pays an assessment on $6,000.00, and the latter on $1,000.00 only. This seems like a somewhat dry piece of humor. It is the bare land alone which receives the benefit, and is enhanced in value. It is the bare land which receives the benefit of the OPPORTUNITY to turn farm property, say, into suburban residences. By using such opportunity, expensive farm buildings might become a total loss. Any buildings, farm or residence, will cost very nearly if not quite the same without as with the improvement, unless in-

deed it is an entirely new road, giving access where before there was none. It is the bare land's "POTENTIALITY of receiving a benefit", and *"its adaptation to uses which would be promoted by the improvement"*, which are the things to which consideration is to be given. It is a very different thing to levy an assessment one-third according to value of land and PRESENT improvements only.

People v. *Syracuse*, 63 N. Y. 291.
See *Wright* v. *Boston*, as cited in *Snow* v. *Fitchburg*, *infra*.

It was in utter disregard of all this, to assess the Marianna Matthews tract of 7.10 acres on about $7,500.00 of then PRESENT buildings, and the Mortimer Matthews tract of 44.07 acres, on about $4,600.00 of then PRESENT buildings, without taking into account with equal effect the "potentiality" of Archbishop Moeller's land becoming the site for the buildings of a great institution, and that the improvement of Section X might promote its "adaptation" to such valuable uses. This is by way of argument merely to show that neither the highly valued then present Matthews buildings, nor the low valued then present Moeller buildings should have cut any definite figure at all in the assessment; that they had nothing to do with the case; that the land on which they stood should have been "considered simply in its general relations and apart from its particular use at the time"; and that the assessment, so far as it brought into account, in definite ratio, the value of then present buildings, was upon a wrong principle.

Railroad Co. v. *Barber Asphalt Co.*, 197 U. S. 430.

See illustrations **(c)**, **(d)** and **(e)** *supra* 14-15.

The proposition, and the reasons on which it is based, are directly supported by the authorities. Some of them go further; but it may, at least, be gathered from them, as

a whole, that the value of buildings in a definite inflexible ratio, as in this case, may not be used as a factor in arriving at a proper appraisal of benefits.

Appeal of Piper, 32 Cal. 530, 553-4.
Snow v. *Fitchburg,* 136 Mass. 183, 184.
Peters v. *Newark,* 2 Vroom 360, 361, 364.
Hoffield v. *Buffalo,* 130 N. Y. 387, 393.

In the *Appeal of Piper,* cited also above under another point, the court further decided, that the benefits resulting from the widening of a street accrue to the owner through his estate in the land, whether the estate be a fee or a leasehold, and not through the buildings thereon, and that *the enhancement in value accrues to the land, not to the buildings.*

The court, at page 554, said:

"The land in the strictest sense of the term, is the only thing of a permanent character. It can not be removed, enlarged, diminished, or destroyed, and we do not see why the benefit should not all be regarded as accruing to the land alone. It is so regarded in theory by writers upon political economy. Adam Smith says," etc., • • • (quoting).

(555) "Thus that profound thinker arrives at the same conclusion upon this subject that the commissioners in this case—three practical business men—attained, after investigating the subject in a practical way, and which, it seems to us, *must be attained by every reflecting mind. It would seem that it must be so from the nature of things.* How could it be possible that a building, wherever situate, should be worth any more than it would cost to put another there like it, and, say, the rent, or that portion of the net rent over wear and tear, during the period of time required to erect it and put it in a condition for occupancy? • • •

If any value accrues in consequence of changes in the surrounding circumstances, it necessarily attaches to the land —to the location. Should the building be destroyed by fire, the land would sell for as much without it as with it, less the cost of erecting another like it and the net rents during the period required to put it in a condition to occupy: in practice, probably for more."

In *Snow* v. *Fitchburg*, 136 Mass. 183, the court, at pages 183-4, said:

"The ruling that the assessment should be made according to the value of the land exclusive of buildings, was in accordance with the decisions of this court. *Boston* v. *Shaw*, 1 Met. 130; *Downer* v. *Boston*, 7 Cush. 277; *Wright* v. *Boston*, 9 Cush. 233."

"The tax is not to be assessed according to the immediate necessity for drainage, but according to the opportunity for drainage when the owner may require it. As said in *Wright* v. *Boston, ubi supra*, 'The potentiality of receiving a benefit from the sewer was the thing to be charged with the tax.' It would be manifestly unjust, in making an assessment for a sewer, to value a lot worth $500, with a house upon it worth $5,000, at $5,500, and to value an adjoining lot of the same size and value, but vacant, at $500, when within a few months the owner of the vacant lot might build a house upon it of greater value than the house on the adjoining lot, and require and enjoy facilities for drainage."

In *Peters* v. *Newark*, 2 Vroom 360, the court, at page 364, said:

"The advantage an owner of property acquires by the opening of a new street in a city, must be plainly if not wholly the advanced value of the land. The buildings on it will cost very nearly or quite the same without as with the improvement."

In *Hoffield* v. *Buffalo*, 130 N. Y. 387, the court, at page 393, said:

"It is, however, urged that the assessment was made upon a wrong principle and is for that reason illegal. * * *. The assessors did not fail to consider the improvements on the lands, and having determined that the amount of benefits was not affected by them, assessed it upon the lots respectively without regard to the value of the buildings. This was not in violation of the rule embraced within the reason given in *Kennedy* v. *City of Troy* (77 N. Y. 493), for decision in *Clark* v. *Village of Dunkirk* (12 Hun. 182, 75 N. Y. 612). And was in harmony with the views of the court upon which *O'Reilley* v. *City of Kingston* (114 N. Y. 439), was determined. The facts so found do not show that the assessors proceeded on a wrong rule of law in making their estimate of the benefits to the lands assessed."

CONCLUSION.

It is submitted, that the court should entertain jurisdiction of these cases, and review the judgments of the Court of Appeals, and that upon the merits, it should find the assessments complained of repugnant to the due process clause of the Fourteenth Amendment, in omitting the consideration of the factor of distance of access, in including the value of land upon a parallel road, and the value of buildings as a part of the value of lands, and finally in assessing any of the plaintiffs' lands, all lying upon a parallel road, to any extent whatever, and modify the judgments of the Court of Appeals accordingly.

Respectfully submitted,

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Counsel for Marianna Matthews,
Plaintiff in Error,
and
Pro se.

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Supreme Court of the United States

Nos. 297 and 298.

OCTOBER TERM, 1924.

MARIANNA MATTHEWS,

Plaintiff in Error,

(30144) vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio.

MORTIMER MATTHEWS,

Plaintiff in Error,

(30145) vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio.

In Error to the Court of Appeals for the First Judicial District of the State of Ohio.

ADDENDA TO BRIEF FOR THE PLAINTIFFS IN ERROR.

MORTIMER MATTHEWS,
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ADDENDA TO BRIEF FOR THE PLAINTIFFS IN ERROR.

The plaintiffs in error desire to add to their brief the following citations:

(1) Near the top of page 19, before the paragraph beginning with the word "Finally", we insert a paragraph containing citations, and a discussion making application of them to the cases before the court, as follows:

In *Hetrick* v. *Village of Lindsey*, 265 U. S. 384, this court entertained jurisdiction to review a judgment of the Su-

preme Court of Ohio, which dismissed, as frivolous, a petition in error to review a judgment of the State Court of Appeals. In order to have adjudged in accord with the rule in *Norfolk Turnpike Co.* v. *Virginia,* 225 U. S. 264, this court must have held the judgment there reviewed, to have been *plainly* not a dismissal for lack of jurisdiction, but an affirmance of the judgment below, upon the merits, and therefore a final judgment in the suit, for a review of which it had jurisdiction under Section 237 of the Judicial Code. There were, however, in that record, as in this, other questions, which were not constitutional; and there was no attempt, as also here, to bring them up to the Supreme Court of Ohio, by a motion to certify the record. It equally did not appear but that, if properly invoked, the Supreme Court of Ohio might have exercised its discretionary jurisdiction, and might have reviewed the State Court of Appeals upon these other questions. Notwithstanding this fact, this court entertained jurisdiction to review that judgment, confined as it was, to the constitutional questions only. By its action here, which is plainly not an affirmance, but a dismissal for lack of jurisdiction, the Supreme Court of Ohio did, in fact, make the judgment of the Court of Appeals no less final, than its own in *Hetrick* v. *Village of Lindsey.* It is here, no more, and no less than there, an open question, whether or not the Supreme Court of Ohio might have exercised its discretionary jurisdiction, and have reviewed the Court of Appeals, upon such other questions. It is difficult to see how the failure to invoke the discretionary jurisdiction *there* did not prevent finality, but would do so *here.* If this analysis of that case is correct, it would seem to be conclusive.

(2) Near the foot of page 19 in connection with the cases there cited, we also cite the case of *Baltimore R. Co.* v. *Sixth Presbyterian Church,* 19 Wall. 62.

(3) At the end of the paragraph near the top of page 20, we cite the following cases: *Bi-Metallic Co.* v. *Colorado*, 239 U. S. 441, 444; *Bashore* v. *Brown*, 108 Oh. St. 18; *Davis* v. *Wechsler*, 263 U. S. 22; *Hetrick* v. *Village of Lindsey*, 265 U. S. 384, 387.

(4) In connection with the reference to *Gast Realty Co.* v. *Schneider Granite Co.* (240 U. S. 55), near the foot of page 24, we cite also *Schneider Granite Co.* v. *Gast Realty Co.*, 245 U. S. 288.

Respectfully submitted,

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and
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Reply Brief for Plaintiffs in Error.

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Reply Brief for Plaintiffs in Error.

The defendant's so called Argument on the Merits (Defendant's Brief 6) is not an argument on the merits at all, as presented by us, under the heads II Distance of Access, and III, Value, in our brief, pages 20 and 27. It is rather an argument that there was no

jurisdiction in the court below as a court of equity to hear the merits of the questions, because the plaintiff did not file objections before the county commissioners as an equalizing board under Section 1214.

We think the argument was sufficiently answered at pages 19-20 of our original brief; but beg leave to reply a little more in detail with citation of further authorities.

Under title X entitled "Counties," chapter 6 entitled "County Surveyor," Sections 2782-2822, of the Ohio General Code, the county surveyor is an independent county officer, elected by the people, giving bond, and taking an oath for the performance of his duties, including those imposed upon him by Section 1214. It is *he* who, under the terms of that section, is to make the "*tentative apportionment*" (not estimated assessment), and not the commissioners, who are only to cause him to do so. It is he who has inherent power to adopt proper rules to make his action equal and uniform, and not they.

Miami Conserv. District v. *Ryan*, 104 Ohio St., 79, 87.

It is not until he has made this tentative apportionment upon his own independent investigation and judgment, "according to the benefits accruing to the lands so located," and pursuant to rules independently adopted by himself, and not dictated by them, and has filed *such* "tentative apportionment" with the commissioners, and has so certified his action to them, that the commissioners are given authority to publish notice that "*such* estimated assessment is on file," and in the absence of just objections, to adopt the assessment

and to approve and confirm the same. When therefore the commissioners, as in this case, formulated beforehand certain specific rules of assessment, whether sufficient to cover the various tracts of land in the assessment area in their various relations to the improvement affecting benefits, or not, and this, not as suggestions merely, as claimed by the other side, but as the sum total of their act, by which under the statute, they were supposedly causing him to make the tentative apportionment, and were "directing" his action, it is quite apparent that they did not cause *him* to make any apportionment at all according to benefits, but had done that themselves, as they supposed, according to their own uninformed judgment; and merely "directed" him to perform the clerical work and arithmetical calculation, necessary to its extension into the several assessments upon the separate tracts of land within the assessment area. Their "direction" that he should do this "by actual view," was not for the purpose of aiding *his* investigation of, and independent valuation of the different varieties and degrees of benefits concerned, but only for the purpose of securing accuracy in his clerical and arithmetical extension to the various tracts of the so-called valuations of the benefits already determined by them. As there is no legal presumption, as claimed by the other side, that he being an independent officer of the county, and presumably knowing what the law and his duties required of him, treated their "directions," as mere suggestions, and either followed or disregarded them, in accordance with his own independent judgment; and as there is no room for the indulgence of any such presumption, because of his report and their finding, that the "estimated assess-

ments" had been made in accordance with *their* valuation of benefits, and not *his,* and because this is confirmed by the assessment roll itself, the publication of notice, such as it was, and the plaintiffs' failure to object, did not prevent the bringing of this suit under Section 12075 Ohio General Code on these constitutional grounds.

That this is the meaning of the statute, and the effect to be given such violations of its terms, and that no such legal presumption may be indulged, are supported by the principles laid down in the authorities, in slightly variant form, as follows:

(a) *Mann* v. *Jersey City,* 24 N. J. L., 662, 665-6-7-8.
Sinclaire v. *West Hoboken,* 58 N. J. L., 129, 130-1.
R. R. v. *Jersey City,* 81 N. J. L., 290, 296, 297.
Steckert v. *East Saginaw,* 22 Mich., 104, 114.
Alvord v. *Syracuse,* 27 Misc. (N. Y.), 392.

(b) *Kellog* v. *Griffiths,* 124 App. Div. (N. Y.), 515.
Boyleston Mkt. Ass. v. *Boston,* 113 Mass., 528 (530-1).
Somerville v. *Dickerman,* 127 Mass., 272, 274, 275.

(c) *McConnell's Mill Road,* 32 Pa. St., 285, 286-7.
Catherine Township Road, 76 Pa. St., 189, 191.
Otter Creek Road, 104 Pa. St., 261, 263.
Sadsbury Tp. Road, 147 Pa. St., 471, 474.

(d) *Allen* v. *Cleveland,* 1 Cleve., 2.
Maple Heights v. *Holtz,* 100 O. S., 264, 5, 6, 7.
Glenn v. *Waddell,* 23 O. S., 605, 607-8, 609.
Hill v. *Cleveland,* 2 Cleve. L. R., 385, 6, 7.
Chamberlain v. *Cleveland,* 34 O. S., 551, 556-7.

(e) *Warren* v. *Grand Haven*, 30 Mich., 24.
State v. *Hudson*, 27 N. J. L., 314.
State v. *Jersey City*, 28 N. J. L., 500.

Finally, the raising of the question here is precluded by the action of the court below, as said at pages 19-20 of our original brief.

Respectfully submitted,

MORTIMER MATTHEWS,
Counsel for Marianna Matthews,
Plaintiff in Error and *Pro se.*

(14)

Office Supreme Court, U. S.
FILED
JAN. 8, 1926
WM. R. STANSBURY
Clerk.

Supreme Court of the United States

Nos. 39 and 40—October Term, 1925.

MARIANNA MATTHEWS,
Plaintiff in Error,

39 vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio.
Defendant in Error.

MORTIMER MATTHEWS,
Plaintiff in Error,

40 vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio.
Defendant in Error.

In Error to the Court of Appeals for the First Judicial District of the State of Ohio.

Petition for Rehearing

MORTIMER MATTHEWS,
Counsel for Marianna Matthews, Plaintiff in Error.
And Pro Se.

COURT REPORTER PRESS, 430-32 MAIN, CINCINNATI, JANUARY, 1926

Supreme Court of the United States

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Defendant in Error.

In Error to the Court of Appeals for the First Judicial District of the State of Ohio.

Petition for Rehearing.

The Plaintiffs in Error respectfully and with a deference, which is to be understood throughout, without tiresome repetition, pray the Court for a re-hearing, upon the ground of two fundamental misconceptions of the record, and of the law of Ohio, as applicable thereto, shown by the opinion of November 30, 1925, in these cases.

1. This court has said in its opinion (Advance sheets, page 3):

> "We think, however, that in these cases *Norfolk & Suburban Turnpike Company* v. *Commonwealth of Virginia*, 225 U. S. 264, and *Western Union Telegraph Company* v. *Crovo*, 220 U. S. 364, (366), as in the *Hetrick case*, on the face of the record the State Supreme Court did pass on the merits of the case by holding that the questions involving the Constitution of the United States, and being the only ground for a writ of error from this Court, were not debatable."

And this court has held that our cases are to be governed accordingly.

Our fundamental proposition, upon this part of our petition is this: However this court may decide in cases from other states, it remains, nevertheless, under its invariable rule of decision, long established, that where the Supreme Court of a state has rendered a decision construing the statutes or constitution of the state, that decision will be accepted as final by this court, as the law of that state, that, it is clearly bound to hold, that a dismissal by the Supreme Court of Ohio, on the ground that the record contains no *debatable* constitutional question, is a dismissal for want of jurisdiction; and that it is not, either concurrently, or at all, a decision upon the merits. This is for the reason, (1) that the Supreme Court of Ohio, by a long course of practice, unequivocally *understands itself* so to be doing, and must be held to have so decided, and for the further reason, (2) that this must *necessarily be so*, because a decision upon the merits would be to entertain jurisdiction, and would be to hold that the case

was rightly in court, and would require the court to decide other questions, not constitutional, arising on the record. It, therefore, could not dismiss the petition, *solely* for the want of a debatable constitutional question, but could do nothing other than affirm, or reverse, or might dismiss for that reason, and for the *additional* express reason, either that no other questions were raised by the record, or, *perhaps,* that the latter were equally frivolous, or not debatable. To infer that when that court dismisses on the sole ground that there is no debatable constitutional question raised, it is dismissing the cause upon the merits, is to assume that it is doing an unlawful act, which of course is not a permissible assumption.

That this is the interpretation of the Constitution of Ohio, as determined by its Supreme Court, we need only refer to *Chicago Ornamental Iron Co.* v. *Rook,* 93 Ohio St., 152. This case was taken to that court as of right upon a constitutional question. While the court held that the case was properly there on that account, it nevertheless disposed of the case upon *another question* arising on the record, and affirmed the judgment below. So, in the cases of *Matthews* v. *Huwe* and *Hetrick* v. *Village of Lindsey,* 265 U. S., 384, the records presented questions other than those which were constitutional. The Supreme Court of Ohio nevertheless dismissed all, the former two because no "debatable" constitutional question was raised, the latter because the statutes in question had so long been held constitutional, "that their constitutionality could no longer be questioned." They were all dismissals for want of jurisdiction; otherwise the cases were properly in the Supreme Court of Ohio, which would necessarily have felt bound to pass upon the other questions, and have

either affirmed, or reversed, or at least dismissed upon an additional express ground that they too were not debatable.

In the index to Vol. 109 of the Ohio State Reports, at page 694 under the heading of "Jurisdiction—Supreme Court—Dismissals—No Constitutional Questions Involved, appears the following. See *Matthews* v. *Huwe,* 628; *Dix* v. *Shoemaker,* 629; *Krug* v. *Roberts,* 630; *Gehring* v. *Shuster Co.,* 631; *Brick & Tile Co.* v. *Trust Co.,* 633; *Ossage* v. *Foley,* 635; *Rickey* v. *Baughman,* 638; *Doud* v. *Cincinnati,* 639."

In only one of these cases, *Dix* v. *Shoemaker,* is the word "debatable" absent, yet all are under the same head-note, *"No constitutional question involved,"* and as we have seen, are in that way indexed. Upon a rehearing, if granted, we desire to cite innumerable cases reported at the ends of the last ten or twelve volumes of the Ohio State Reports, to the same effect. Only a very few of these omit the word "debatable;" yet all have the same head-note and are indexed alike. The cases above in 109 Ohio State Reports are typical.

Seba H. Miller, at that time, "Of the office of the clerk of the Supreme Court (of Ohio) and member of the Springfield Bar," and now the clerk of that court, in 1922, published a manual entitled "The Law and Practice in Error Proceedings and in Original Actions in the Supreme Court of Ohio, with Forms" etc. At Sec. 117 (page 106) of this manual, the author says:

> "Sec. 117. Constitutional question must be debatable. Cases have been filed in which many alleged constitutional questions were presented, apparently with the hope that perhaps some merit might later on be found in one of them. The allegation of the violation of numer-

> ous rights guaranteed by the constitutions of the United States and the State of Ohio does not confer jurisdiction upon the Supreme Court to hear the case. The question must be involved in the case, *and it must be debatable*, or it is not a constitutional question within the meaning of Article IV Section 2 of the Constitution."

In addition to the necessity, that it must in the nature of things be so, we find the Reporter of the Ohio Supreme Court and its clerk's office taking the view maintained by us, and the court itself acquiescing in these public utterances, and continuing in its same course without comment. In fact, the Supreme Court of Ohio derived these views from *this* court, for Mr. Miller very aptly cites in support of them upon his next page 107, *Consolidated Turnpike Company* v. *Norfolk & Ocean View Railway Company*, 228 U. S., 596, and *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308. We have reason to think the Supreme Court of Ohio will be as much surprised at the source, as by the fact, of the decision, that it did not dismiss the present cases for want of jurisdiction.

This Court continues on page 3 of its opinion, immediately after what we have quoted at page 2 above:

> "It is one of those not in frequent cases in which decision of the merits of the case also determines jurisdiction. The petition was dismissed, not because the court was really without jurisdiction, for it could have taken it, but because the question was regarded as frivolous, which is a different thing from finding that the petition was not in character one which the Court could consider."

This is only partly correct, and then only in cases

where the constitutional question, upon which jurisdiction depends, is also the identical question upon which the merits depend. It might be made to apply to our cases in *this* court, but not in the Supreme Court of Ohio. This was pointed out in *Equitable Life Assurance Company* v. *Brown, supra,* where the motion was to dismiss *or* affirm, and this court preferred to grant the former, rather than the latter, simply because it was first in order. The implication however is strong, in fact conclusive, that dismissal because the question was *frivolous* was to deny jurisdiction, and that the only way to entertain jurisdiction, and then dispose of the case upon the same ground, was to grant the motion to affirm. What the court now says is a misapplication of what Mr. Justice White said at pages 314-315 of that case.

In *Milheim* v. *Moffat Tunnel District,* 262 U. S., 710, this court very recently took the same view. Here also there was a motion to dismiss *or* affirm. The court decided that a federal question which requires analysis, and exposition for its decision is *not frivolous* and withstands a motion to dismiss the writ of error, p. 716; but a motion to affirm should be granted if the questions on which decision depends are so wanting in substance as not to need *further* argument p. 717. The holding of the Supreme Court of Ohio, that the questions were not debatable at all, not only foreclosed any thing that could be termed "*further argument,*" but also "analysis and exposition," for certainly these are debate.

Coming now, to a consideration of the jurisdiction of this court, so far as it is analogous in principle, to that of the Supreme Court of Ohio, we find, in *Sugarman* v. *United States,* 249 U. S., 182, where this court dismissed a writ of error to a District Court of the

United States, on the ground that it did not present a *substantial* constitutional question, that the court said (p. 185): "As no substantial constitutional question was presented by the defendant, this court is without jurisdiction to review the *other errors* assigned." If anything the phrase "not debatable" is stronger to show lack of jurisdiction than the phrase "not substantial," for the latter it is conceivable, might require "analysis and exposition," while the former, by its very terms, would not.

And so, in *Zucht* v. *King*, 260 U. S. 174, the same use is made of the phrase "substantial." Here too this court disposed of *another* question upon the record, by saying (177): "Unless a case is otherwise properly here on writ of error, questions of that character can be reviewed by this Court only on petition for a writ of certiorari."

The doctrine of all these cases in this court, is, that, a finding of *frivolty* or lack of *substantiality* accompanied by dismissal, is a dismissal for want of jurisdiction. To be otherwise, it would have to be followed by an affirmance of the judgment below.

In view of all these cases, *Hetrick* v. *Village of Lindsey, supra,* is as inadvertently a departure from the settled doctrine of this court, as the first ground, upon which the present cases are decided.

We come now to the second, or alternative ground on which the decision of these cases is based.

2. This Court finally says in its opinion (Adv. Sheets 3):

> "Another reason why the motion (writ of error) must be dismissed, even if the foregoing conclusion were wrong, is that the plaintiffs in error did not exhaust all their remedies for

> review by the Supreme Court of the State. After their petitions for writs of error as of right were denied, they had under the Ohio practice the right to apply to the Supreme Court in its discretion for writs of certiorari to bring the cases to that court for its consideration. No such application was made."

The first of these quoted sentences may or may not be sound, according as the court may think it does not, or does depend upon the second sentence, upon considering what we have to urge a little hereafter. The second sentence however is based upon a *fundamental misunderstanding* of what the record contains and of the law of Ohio, which is applicable.

The judgment of the court of appeals was entered April 25th, 1923 (Record page 26). The entry of dismissal by the Supreme Court of Ohio was entered in the Court of Appeals December 27, 1923, (Record 12).

The constitution of the State of Ohio, Article IV, Section 2, provides first, that the Supreme Court of Ohio shall have "appellate jurisdiction in all cases involving questions arising under the constitution of the United States or of this state" and again, that "in cases of public or great general interest the Supreme Court may *within such limitation of time as may be prescribed by law,* direct any Court of Appeals to certify its record to the Supreme Court, and may review or affirm, modify or reverse, the judgment of the Court of Appeals."

In *Akron* v. *Roth*, 88 Ohio St., 456, the Supreme Court itself prescribed a limitation of seventy days, within which application can be made for an order to certify on the ground of "general or great public interest."

It is of the utmost importance, to observe that this

limitation of seventy days is not an ordinary statute of limitations, but a conditional limitation of the jurisdiction conferred.

At the time the Supreme Court of Ohio dismissed the petitions in error on the ground that the records involved no debatable constitutional questions, the time had long since expired, within which it had power to direct certification on the ground of "public or great general interest." After seventy days from April 25, 1923, that court had no such power; but it was not until December 27, 1923 that *it became, by mandate of the Supreme Court of Ohio, the law of these cases,* that the Court of Appeals was the highest court, in which a decision *in these cases* could be had. It did become so at that time, for at that time the Supreme Court of Ohio had no power to order certification, even if application had been made. This mandate was the cause, by which alone finality can be attributed to these judgments of the Court of Appeals. Our contention, therefore, that its judgments were final judgments, "susceptible of being here reviewed by writ of error," *do not* "rest upon the impossible assumption," that their finality "existed before the happening of the cause, by which alone finality could be attributed to them." These judgments thus susceptible of being reviewed here were *not "open at the same time* to the power" of the Suprem Court of Ohio to review and modify. It is *thus* we distinguish or apply *Andrews* v. *Virginian Railway Co.,* 248 U. S., 272.

To sum up what we have to say in this connection, the Supreme Court of Ohio, without contribution on our part, made these judgments, for the first time, final, so far as this court is concerned, long after the former court's power under the Ohio constitution to order

certification had expired. It would seem to follow, that these are "final judgments or decrees in a suit in the highest court of a state in which a decision in the suit could be had."

If these considerations are sound, they also distinguish *Stratton* v. *Stratton*, 239 U. S., 55, wherein there was no petition in error as of right at all, *a fortiore* none dismissed long after the expiration of the constitutional power to order certification. The case has no application.

We present our petition for a rehearing, conscious of the fact, that what we have said, somewhat closely impinges upon a re-argument, which has not as yet been granted. We have not known, however, how else to challenge the attention of the Justices of the court, than by, as briefly and distinctly as possible, indicating the kind and force of the re-argument, which can be made, if this petition is granted.

We respectfully pray that the petition be granted.

MORTIMER MATTHEWS,
Counsel for Marianna Matthews,
Plaintiff in Error.
And Pro Se.

CERTIFICATE OF COUNSEL.

It is hereby certified, this 4th day of January, 1926, by counsel for the Plaintiffs in Error, that the foregoing Petition for a Re-hearing is presented in good faith and not for delay.

MORTIMER MATTHEWS,
Counsel for Plaintiffs in Error.

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Supreme Court of the United States

Nos. 297 and 298.

OCTOBER TERM, 1924.

MARIANNA MATTHEWS,

Plaintiff in Error,

vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio.

MORTIMER MATTHEWS,

Plaintiff in Error,

vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio.

In Error to the Court of Appeals for the First Judicial District of the State of Ohio.

BRIEF FOR DEFENDANT IN ERROR

STATEMENT OF THE CASES.

These two causes come into this Court on writs of error, sued out on the same grounds, seeking review and modification of judgments of the Court of Appeals of Hamilton County, Ohio, for the First Judicial District of that state.

These judgments were entered on the twenty-fifth day of April, 1923.

The plaintiffs filed a petition in error as of right in the Supreme Court of Ohio, which proceedings were dismissed by the Supreme Court of Ohio on the 4th day of December, 1923, on the ground that the records did not present any debatable constitutional question.

(Record 297, page 12; Record 298, page 7; Matthews vs. Huwe, 109 Oh. St. 628.)

The proceedings in the Court of Appeals of Ohio were on appeal by the plaintiffs from adverse judgments of the Court of Common Pleas.

The plaintiffs sought injunctions against the collection by the defendant of certain assessments upon one tract of land owned by Marianna Matthews and upon five other tracts of land owned by Mortimer Matthews, which assessments were levied against said property by the Commissioners of Hamilton County, under Section 1214 of the General Code of the State of Ohio, for the improvement of Section X of the Glendale and Milford Road, being Inter-County Highway No. 46, Section X.

Section 1214 of the General Code of Ohio is in the words and figures following:

> "Sec. 1214. Except as otherwise provided in this chapter, the county shall pay twenty-five per cent of all cost and expense of the improvement. Fifteen per cent of the cost and expense of such improvement, except the cost and expenses of bridges and culverts, shall be apportioned to the townships

in which such road is located. If the improvement lies in two or more townships, the amount to be paid by each shall be apportioned according to the number of lineal feet of the improvement lying in each township. Ten per cent of the cost and expense of the improvement, excepting therefrom the cost and expense of bridges and culverts, shall be a charge upon the property abutting on the improvement, provided the total amount assessed against any owner of abutting property shall not exceed thirty-three per cent of the valuation of such abutting property for the purpose of taxation. Provided, however, that the county commissioners by a resolution adopted by unanimous vote may increase the per cent of the cost and expense of the improvement to be specially assessed and may order that all or any part of the cost and expense of the improvement contributed by the county and the interested township or townships be assessed against the property abutting on the improvement; and provided further, that the county commissioners by a resolution passed by unanimous vote may make the assessment of ten per cent or more, as the case may be, of the cost and expense of improvement against the real estate within one-half mile of either side of the improvement or against the real estate within one mile of either side of the improvement. Township trustees shall have the same power to increase the per cent to be special-

ly assessed and to change the assessment area where the improvement is made on their application. The county commissioners or township trustees upon whose application the improvement is made shall cause the county surveyor to make a tentative apportionment of the amount to be paid by the owners of the property specially assessed, which apportionment shall be made according to the benefits accruing to the land so located. The county surveyor shall file such apportionment with the county commissioners or township trustees for the inspection of the persons interested. Before adopting the estimate so made and reported, the commissioners or trustees shall publish once each week for two consecutive weks in some newspaper published in the county and of general circulation in the township where the improvement is located, notice that such estimated assessment has been made and that the same is on file in the office of the county commissioners or with the township trustees and the date when objection, if any, will be heard to such assessment. If any owner of property affected thereby desires to make objections, he may file his objection to said assessment in writing with the county commissioners or township trustees, as the case may be, before the time for said hearing. If any objections are filed, the county commissioners or township trustees shall hear the same and act as an equalizing board and they

may change said assessments if in their opinion any change is necessary to make the same just and equitable, and such commissioners or trustees shall approve and confirm said assessments as reported by the surveyor or modified by them. Such assessments when so approved and confirmed shall be a lien on the land chargeable therewith. (107 Ohio Laws, 129, 130.)"

ARGUMENT ON JURISDICTION

It is contended the present proceedings are erroneous in that an effort is here made to have the judgment of an intermediate Court—the Court of Appeals—reviewed, rather than the judgment of the highest Court of the State—the Supreme Court of Ohio.

On Page 7 of the Transcript of Record is to be found the following entry of the Supreme Court of Ohio:

"1923, Dec. 27 (Nov. Term)—Minute 52, certified copy from Supreme Court dismissing petition in error at the costs of plaintiff in error.

"This cause came on to be heard upon the transcript of the record of the Court of Appeals of Hamilton County, and it appearing to the Court that this cause was filed as of right, and that the record presents no debatable constitutional question, it is ordered that the petition in error be, and the same hereby is dismissed.

It is further ordered that defendant in

error recover from the plaintiff in error his costs herein expended, taxed at $....."

This entry establishes that the Supreme Court of Ohio assumed jurisdiction of the cause and determined that no debatable constitutional questions were involved. In the face of this judgment by the Supreme Court of Ohio in these causes, the plaintiffs in error, prosecute error here not from the Supreme Court of the State, the highest court in which a decision in the suit could be had, but from the judgment of the Court of Appeals of the First District of Ohio—an intermediate Court.

We submit that the proper foundation has not been laid for a review of these causes by this Honorable Court.

Stratton vs. Stratton, 239 U. S. Reports, page 55.

Andrews, Admx. of Andrews vs. Virginia Railway Company, 248 U. S. Reports, page 272.

ARGUMENT ON MERITS

Plaintiffs entire assignment of errors is predicated upon the fact that the County Commissioners in their resolution of May 11, 1920 (Page 82 of the Record) suggested a plan of arriving at a tentative apportionment of the assessments.

The County Surveyor by the provisions of Section 1214 is the official to prepare the estimated assessment roll and the record discloses that on June 11, 1920, the County Surveyor pre-

sented and filed the estimated assessments with the Commissioners. (Page 87 of the Record.)

Notice of the filing of the estimated assessment roll was duly published as required by Section 1214 General Code of Ohio (Record pages 88 and 89) and a public hearing held, follow which the Commissioners adopted the assessments by their resolution of July 9, 1920 (Page 90 of the Record) reciting

> "Whereas such apportionment is according to the benefits which will result in said real estate" and
>
> "Whereas, no valid objections have been filed to said assessment."

We think it clear that the three-way plan of apportioning the assessments was a suggestion merely and we have no hesitancy in endorsing its value because it covers and embraces properly all the elements that enter into a just and equitable apportionment of special benefits.

However, if as plaintiff in error contends, the commissioners had no legal right to suggest a method of apportionment, they by attempting so to do, exceeding their authority and so much of their suggestion as relates to the method of preparing the estimated assessment roll, is of no legal effect.

In the instant case, no objections were filed in writing as is provided by Section 1214 of the General Code.

"That the legislative power of the state may authorize special assessments for special road improvements and may direct them to be made in proportion to the frontage, area or market value of the adjoining property, at its discretion is, under the decisions, no longer an open question."

Mattingly vs. District of Columbia, 97 U. S. 687, 692 and

French vs. Barber Asphalt Paving Company, 181 U. S. page 324.

In conclusion, we respectfully urge that the assessments made against the plaintiffs in Error property are not repugnant to the due process clause of the Fourteenth Amendment.

CHAS. S. BELL,
Prosecuting Attorney,
Hamilton County, Ohio.

CHESTER S. DURR,
Asst. Prosecuting Attorney,
Hamilton County, Ohio.

SUPREME COURT OF THE UNITED STATES.

Nos. 39 and 40.—October Term, 1925.

Marianna Matthews, Plaintiff in Error, 39 *vs.* Louis J. Huwe, as Treasurer of Hamilton County, Ohio.	Writs of Error to the Court of Appeals for the First Judicial District of the State of Ohio.
Mortimer Matthews, Plaintiff in Error, 40 *vs.* Louis J. Huwe, as Treasurer of Hamilton County, Ohio.	

[November 30, 1925.]

Mr. Chief Justice Taft delivered the opinion of the Court.

Marianna Matthews owns one tract of land, and Mortimer Matthews five others, in Hamilton County, Ohio. They lie within half a mile of Section X of the Glendale and Milford Road. The plaintiffs brought suits under Section 12075 of the General Code of Ohio, providing that Common Pleas Courts may enjoin the illegal levy or collection of taxes and assessments, to enjoin the county treasurer, the defendant in error, from collecting assessments made and levied on these lands for the cost of the improvement of Section X. Among other grounds for the petitions were allegations that the proceedings to assess were in violation of the Fourteenth Amendment of the Federal Constitution, in that they took away property from the plaintiffs without due process of law. In the Common Pleas Court the injunctions were sustained to the extent of some interest found to be excessive, but were denied in other respects. An appeal was taken to the Court of Appeals of Hamilton County, which affirmed the decrees of the Common Pleas Court. Appeals as of right were then prosecuted to the Supreme Court of the State, based on the ground that the cases involved constitutional questions. The Supreme Court made the following order in each case:

"Dec. 27, 1923. . . . This cause came on to be heard upon the transcript of the record of the Court of Appeals of Hamilton

County, and it appearing to the Court that this cause was filed as of right, and that the record presents no debatable constitutional question, it is ordered that the petition in error be, and the same hereby is dismissed."

"It is further ordered that defendant in error recover from the plaintiff in error his costs herein expended, taxed at $....."

Thereupon writs of error were applied for and allowed not to the Supreme Court of Ohio, but to the Court of Appeals. Motions are now made to dismiss the writs.

We think the motions must be granted. In *Hetrick* v. *Village of Lindsay*, 265 U. S. 384, Hetrick brought suit under the same section of the Ohio Code to enjoin the illegal collection of a special assessment. The injunction was denied in the Common Pleas Court and in the Court of Appeals, on appeal. The plaintiff filed a petition in error in the Supreme Court of the State. The defendant moved to dismiss on the ground that no leave to file it had been granted. The plaintiff claimed that no leave was necessary under the Ohio practice, because the case involved a question under the Constitution of the United States, and the appeal was of right. The Court sustained the motion to dismiss, on the ground that the statute whose validity was attacked had been so long held constitutional by the courts of the State that it could no longer be questioned. A writ of error to bring the case here was allowed by the Chief Justice of the Ohio Supreme Court and entertained by this Court. That case is exactly like this except as to the court to which the writ of error was directed.

The plaintiffs in error rely on the case of *Norfolk and Suburban Turnpike Company* v. *Commonwealth of Virginia*, 225 U. S. 264, and the rule laid down by Chief Justice White, in which he said (at p. 269):

"for the purpose of avoiding the complexity and doubt which must continue to recur and for the guidance of suitors in the future, we now state that, from and after the opening of the next term of this court, where a writ of error is prosecuted to an alleged judgment or a decree of a court to or an appeal from a lower state court, unless it plainly appears, on the face of the record, by an affirmance in express terms of the judgment or decree sought to be reviewed, that the refusal of the court to allow an appeal or writ of error was the exercise by it of jurisdiction to review the case upon the merits, we shall consider ourselves constrained to apply the rule announced in the Crovo case, and shall therefore by not departing from the face of the record, solve

against jurisdiction the ambiguity created by the form in which the state court has expressed its action."

Western Union Telegraph Company v. *Crovo,* 220 U. S. 364, 366, was a Virginia case, in which a writ of error was denied by the Supreme Court of Appeals under a local practice, because the Court thought "the judgment was plainly right." The law and equity court, that is the lower court, was held to be the highest court of the State to which the case could be carried, and the writ of error from this Court to that court was sustained, a federal question being properly saved.

We think, however, that in these cases, as in the *Hetrick* case, on the face of the record the State Supreme Court did pass on the merits of the case by holding that the questions involving the Constitution of the United States, and being the only ground for a writ of error from this Court, were not debatable. It is one of those not infrequent cases in which decision of the merits of the case also determines jurisdiction. The petition was dismissed, not because the Court was really without jurisdiction, for it could have taken it, but because the question was regarded as frivolous, which is a different thing from finding that the petition was not in character one which the Court could consider.

Another reason why the motion must be dismissed, even if the foregoing conclusion were wrong, is that the plaintiffs in error did not exhaust all their remedies for review by the Supreme Court of the State. After their petitions for writs of error as of right were denied, they had under the Ohio practice the right to apply to the Supreme Court in its discretion for writs of certiorari to bring the cases to that Court for its consideration. No such application was made.

In *Stratton* v. *Stratton,* 239 U. S. 55, another Ohio case, a writ of error was directed to the Court of Appeals to reverse a judgment of that Court, on the ground that it was the highest court in which a decision in the suit could be had. It was held, however, that as the Supreme Court by the constitution of the State had authority to review the judgments and decrees of the Courts of Appeal by certiorari and no application had been made therefor, the Appellate Court could not be considered the court of last resort and a writ of error from this Court to that would not lie. The same view was taken in *Andrews* v. *The Virginian Railway Company,* 248 U. S. 272. The plaintiffs in error are thus in a

dilemma from which they cannot escape. If the Supreme Court by final decree disposed of the constitutional questions on the merits by dismissal of the petition, then the writ of error lay to the Supreme Court. If it did not, then the decree of the Court of Appeals did not become that of the highest court to which a writ of error would lie from this Court for lack of application for certiorari.

The motions to dismiss must be granted.

A true copy.

Test:

Clerk, Supreme Court, U. S.